

89-639

NO. _____

Supreme Court, U.S.
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CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

NATIONAL FUNERAL SERVICES, INC.

Petitioner,

v.

JOHN D. ROCKEFELLER, ET AL

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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m6P/2



I. QUESTIONS PRESENTED FOR REVIEW

ISSUE NO. 1

Does telemarketing presumptively present the same solicitation risks and dangers which face-to-face in person solicitation presents regarding the exercise of fraudulent sales tactics, overreaching, undue influence or coercion by the soliciting party. Does a Constitutional First Amendment analysis of the regulation of telemarketing therefore proceed under the more restrictive regulatory control prohibitions for face-to-face solicitation as established by prior decisions of this Court? Ohralik v. Ohio State Bar Assoc., 436 U.S. 447 (1978); Shapero v. Kentucky Bar Association, 486 U.S. ____ 108 S.Ct. 1916 (1988).

ISSUE NO. 2

In the regulation of commercial speech which is not content neutral, does a total

prohibition on an otherwise permissible mode of advertising without a showing that the fashioned regulation is necessary or reasonable in light of the enunciated State interest, constitute regulation in a manner which is narrowly tailored to achieve the State's desired objectives? Central Hudson Gas v. Public Service Commission, 447 U.S. 557 (1980) and Board of Trustees of the State University of New York v. Fox, ____ U.S. ____ Case No. 87-2018 (decided June 29, 1989).

ISSUE NO. 3

Does the legitimate State interest in protecting the right of privacy in the home when balanced against commercial rights of free speech guaranteed by the First Amendment permit a State to impose an absolute regulatory prohibition on door-to-door or telephonic solicitation of preneed funeral



goods and services, when at the same time the State does not regulate telephonic and door-to-door solicitation for all other types of goods and services? Martin v. Struthers, 319 U.S. 141 (1943) and Frisby v. Schultz, 56 U.S.L.W. 4785 (June 28, 1988).

ISSUE NO. 4

In regulating against a particular commercial activity, can the State's police powers regulate only a portion of those individuals who act in a manner which threatens legitimate State interests while at the same time exempting from regulation, without any rational basis, and contrary to statutory intent, other individuals or entities who also undertake the same prescribed deleterious activities? New Orleans v. Dukes, 472 U.S. 297 (1976).

ISSUE NO. 5

Do United States Supreme Court decisions require a Supremacy Clause preemption



analysis to also consider the effect of inferior legislation upon a clearly stated superior federal policy? Hines v. Davidowitz, 312 U.S. 52 (1941); Commonwealth of Pennsylvania v. Nelson, 350 U.S. 497 (1956); and Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984).



RULE 28.1 LIST

National Funeral Services, Inc., is a privately owned subsidiary of Legacy One, Inc., a West Virginia privately owned corporation, both said corporations have a financial interest in the outcome of this proceeding.

PARTIES:

Petitioners (Plaintiffs below):

John D. Rockefeller, IV, et al, Governor of the State of West Virginia, State of West Virginia, West Virginia Department of Labor, Lawrence Barker, Commissioner

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REFERENCE TO OPINIONS BELOW:

National Funeral Services, Inc. v. John D. Rockefeller, 870 F.2d 135 (4th Cir. 1989)
(See Appendix)

STATEMENT OF THE GROUNDS OF JURISDICTION

1. Date of judgment sought to be reviewed: March 7, 1989; (see appendix), Motion for Rehearing and Suggestion for Rehearing In Banc denied by order dated and entered June 1, 1989 (see appendix).
2. Statutory provisions conferring jurisdiction on this Court: 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS WHICH THE CASE INVOLVES

(See Appendix for full text)

U.S. Constitution Article I, § 8,
Article VI, § 2
U.S. Constitution First Amendment
U.S. Constitution Fifth Amendment
U.S. Constitution Fourteenth
Amendment
15 U.S.C. § 45
28 U.S.C. § 1291
28 U.S.C. § 1332



28 U.S.C. § 1343
28 U.S.C. § 2201
42 U.S.C. § 1983
16 C.F.R. § 453 (1984)
WV Code § 47-14-1 et seq.
WV Code § 46A-2-132

BASIS FOR FEDERAL JURISDICTION

A. UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF WEST VIRGINIA

United States Constitution, Article I,
§ 8, Article VI, § 2
First, Fifth, and Fourteenth Amendments
to the United States
Constitution
Bill of Rights
28 U.S.C. § 1332 § 1343(e)(4)
28 U.S.C. § 2201
42 U.S.C. § 1983
15 U.S.C. § 45

B. UNITED STATES FOURTH CIRCUIT COURT OF APPEALS

28 U.S.C. § 1291

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

II. STATEMENT OF THE CASE

In August of 1980, the Petitioner, National Funeral Services, Inc., a West Virginia corporation, was incorporated and commenced doing business in southern West Virginia in the Beckley, Oak Hill and Princeton areas and in the northern panhandle of West Virginia in the Martinsburg area.

The Petitioner, National Funeral Services, through its employee sales personnel, marketed preneed funeral goods and services to its customers through newspaper advertisements, door-to-door solicitation, mass mailings, prior lead solicitation and telemarketing.¹

¹(Preneed funeral goods and services are funeral goods and services marketed to a purchaser prior to the demise of the individuals who will use the goods and services.)



National Funeral Services did not conduct cold canvassing of residences in any area but instead followed up on leads obtained from other sources. These leads were designed to determine and locate individuals in particular geographic areas which might be interested in purchasing preneed funeral goods and services.

The Petitioner is a wholly owned subsidiary of Legacy One, Inc., a West Virginia corporation which owns directly or indirectly over a dozen cemeteries and funeral homes throughout the southeastern and midwestern United States. Legacy One, Inc. was originally incorporated in the 1950's and has operated in the cemetery and funeral business in several different states since its incorporation.

The marketing program of National Funeral Services sought to take advantage of



the structural pricing distortions in the funeral industry which are caused by social factors dictating at-need purchases by the deceased's bereaved relatives at a time which precludes effective price or product comparison shopping.

Structural pricing distortions have also occurred because the funeral industry in the United States has experienced very little price or product competition due to the lack of any dissemination of pricing or product information.

In fact the lack of product and pricing information, along with social factors which dictated in favor of at-need purchasing situations were found by the Federal Trade Commission to be the principal market defects which perpetuated anti-competitive forces in the funeral industry markets and requiring the promulgation of 16 C.F.R. 453 (1984).



The preneed funeral goods and services marketed by National Funeral Services consisted of a myriad of funeral goods including caskets, head stones, markers, monuments, funeral clothes, embalming chemicals, urns, burial vaults, and chapel vaults. In addition the Petitioner marketed preneed funeral services which included the performance of the funeral rites, preparation of the body by embalming, provision of viewing facilities, delivery of the body to the cemetery, graveside services and the storage of human remains prior to burial.

Customers entering into these contracts with National Funeral Services ranged in age from their mid-twenties to late seventies. The customer would pre-select funeral packages or individual items which were discussed and described by the salespersons in the customer's homes. The customers could



thereby preplan both the total cost of the funeral and the particular items desired for their funerals according to their own personal tastes and available finances.

The preneed contracts entered into were installment contracts in compliance with federal and state truth in lending laws and other applicable consumer credit laws. These contracts were also subject to West Virginia State laws providing for the cancellation of door-to-door solicitation contracts within seventy two (72) hours of the sale without any penalties to the customer. W.Va. Code § 46A-2-132.

Furthermore, the customer or his/her legal representative could cancel the contract at any time prior to performance and thereby receive a refund of ninety percent (90%) of the original contract amount paid,



plus accrued interest. W.Va. Code § 47-14-6(b).

Beginning in 1974, the Federal Trade Commission instituted formal administrative hearings which were held throughout the United States in order to address the perceived lack of price and product information in the funeral industry and the resultant anti-consumer effects in the funeral industry markets. The rule which was ultimately issued by the Federal Trade Commission at 16 C.F.R. 453 (1984) was a product of approximately ten (10) years of extensive evidentiary hearings and exhibit review.

The Federal Trade Commission rule compels the disclosure of price and product information by telephone, and the delivery of an itemized pricing list for goods and services to be performed. In addition, the



rule prohibits certain unfair or deceptive practices which the Federal Trade Commission discovered within the funeral industry during its investigation.

In 1983 following extensive lobbying by the West Virginia and National Funeral Directors' Association, the West Virginia Legislature amended and passed West Virginia Code § 47-14-1 et seq. (1983) dealing with the regulation of preneed funeral goods and services. The stated policy of this legislation was to assure that funds paid on a preneed basis for funeral goods or services to be delivered or performed at a later date were not dissipated or otherwise depleted, and to further guarantee that adequate funding was available at the time of need in order to assure the later performance of any preneed contractual promises made by contract sellers.



Section 47-14-1 et seq. (1983) sought to assure that the person who holds, controls, or manages funds taken in payment for preneed promises was subject to the limitations and regulations prescribed by the statute.

In stark contrast to this stated policy, Code § 47-14-2 provides an exemption for the sale of traditional cemetery marketed preneed goods which are some of the exact same goods which regulated preneed contract sellers and providers are selling in West Virginia. Furthermore, Code § 47-14-2 provides an exemption for the sale by cemeteries "funeral goods or services" on a preneed basis regardless of the stated intent of Code § 47-14-1.

Section 47-14-2(7) provides:

"funeral goods does not mean services actually performed by a cemetery acting only as such or the sale by a cemetery of cemetery lots, land or interest therein,



services incidental thereto, or the sale by any person of markers, memorials, monuments, equipment, crypts, urns, burial vaults, or vaults constructed or to be constructed in a mausoleum or columbarium." West Virginia Code § 47-14-2(7) (1983) (underscore supplied)

Funeral homes and preneed funeral providers sell many funeral goods and services which cemeteries do not sell. For example, caskets, body preparation, funeral clothes. However, many burial items are sold by both funeral homes and cemeteries. For example, vaults, monuments, markers, memorials, crypts, urns, and sometimes caskets. While the stated policy of the legislation was to require the regulation and trusting of all funds taken under preneed sales in order to protect the public, Section 47-14-2(7) provides an express exemption for many preneed product sales so long as the sales are made by a cemetery or so long as



they are sales of a product type traditionally offered by a cemetery.

West Virginia Code § 47-14-10 also provides for explicit prohibitions on the solicitation of personal residences by telephone call or personal visit unless such solicitation was previously requested by the person solicited or by a family member residing at the residence.

While all other forms of advertising are left open to the Petitioner, telephonic solicitation and door-to-door solicitation is absolutely prohibited unless previously requested by the customer.

Noticeably absent from the stated legislative intent of West Virginia Code § 47-14-1 et seq. is any legislative finding that personal door-to-door solicitation or telemarketing of preneed funeral goods or services by their very nature are subject to



overreaching, coercion, overbearing or other sophisticated sales pressures which will preclude or demean the customer's ability to carefully and fully evaluate the contractual proposals.

Not only was there a lack of general legislative findings or legislative intent in these regards, but at the trial of this matter, the State of West Virginia failed to present any evidence to allege that the salespersons of National Funeral Services or any other salespersons in the State of West Virginia were exercising coercion or overbearing sales techniques in the sale of preneed funeral goods and services. The State's case in these regards rested solely upon the State's paternalistic opinion that consumers would be offended by the uninvited intrusion of a salesperson who seeks to sell funeral goods and services.



In rebuttal of this position, National Funeral Services introduced evidence at the trial of this matter which showed a high degree of willingness on the part of consumers to discuss the proposed preneed sales contracts. In a preemptive rebuttal of the State's arguments of overreaching and coercion (which never factually materialized) National Funeral Services introduced evidence which showed that the total closing percentage for all sales presentations given was only thirty percent (30%). However, the cancellation percentage for contracts executed ran only approximately ten percent (10%) even with seventy two (72) hour and perpetual cancellation rights pursuant to West Virginia Code § 46A-2-132 and § 47-14-6.

The preneed funeral goods and services sold by National Funeral Services were generally sold in the customer's home where a sales presentation was made which disclosed



the different product and price options available.

National Funeral Services sold thousands of preneed contracts in its three (3) years of existence. Many of these contracts were sold to consumers in areas of West Virginia which included long and firmly established local funeral homes.

Many of these funeral homes could lose considerable future business by the sale of preneed contracts and many of these same funeral homes were instrumental as members of the West Virginia Funeral Directors' Association in the promulgation and passage of the legislation challenged therein.

Due to the statutory regulation challenged, the Petitioner has been forced to cease all business operations in West Virginia and has in fact not sold any further preneed funeral goods or services under



preneed contracts in the State of West Virginia since the judicial upholding of West Virginia Code § 47-14-1.

Following the passage and signing of West Virginia Code § 47-14-1 et seq., the Petitioner filed this action in the United States District Court for the Northern District of West Virginia seeking a preliminary injunction and challenging the Constitutionality of West Virginia Code § 47-14-1. In the same action, the Petitioner filed anti-trust claims against the West Virginia Funeral Directors' Association and numerous individual funeral directors in West Virginia for conspiring to restrict and restrain competition within the funeral industry.

This matter was transferred to the Southern District of West Virginia and the Petitioner was initially granted a temporary



restraining order and a preliminary injunction pending the final adjudication of the Constitutional issues presented by the challenged statute.

The anti-trust claims resulted in an agreed settlement between most of the parties and judgment for the Plaintiff against two of the parties. The Constitutional challenge was bifurcated by the United States District Judge for trial on or about December 13, 1985.

By later order and opinion, the Court upheld the Constitutionality of the statute and the Petitioner requested a reconsideration of the Court's judgment and a new trial. The Petitioner's request for a new trial and reconsideration of judgment was denied in February of 1988.

The Petitioner appealed the District Court's ruling to the Fourth Circuit Court of



Appeals and by order and decision dated and filed March 7, 1989, the Court of Appeals affirmed in all regards the District Court's decision. The Petitioner timely filed a motion for rehearing in banc and the Court of Appeals denied the Petitioner's motion for rehearing by order and decision dated and filed June 1, 1989.

REASONS FOR GRANTING THE WRIT
ISSUE NO. 1

Does telemarketing presumptively present the same solicitation risks and dangers which face-to-face in person solicitation presents regarding the exercise of fraudulent sales tactics, overreaching, undue influence or coercion by the soliciting party? Does a Constitutional First Amendment analysis of the regulation of telemarketing therefore proceed under the more restrictive regulatory control prohibitions for face-to-face



solicitation as established by prior decisions of this Court? Ohralik v. Ohio State Bar Assoc., 436 U.S. 447 (1978); Shapero v. Kentucky Bar Association, 486 U.S. ____ 108 S.Ct. 1916 (1988).

ISSUE NO. 1

In what may be a case of first impression, the Courts below in applying a First Amendment commercial speech analysis were required for the first time to consider the Constitutionality of a content based regulation which completely banned the use of unsolicited telemarketing. The ban on telemarketing applies only to preneed funeral goods and services. Telemarketing as used in the case at bar did not include a consummated sale by phone but instead the establishment of an appointment for a home visit for the purpose of soliciting a sale.



Both the Constitutional issues and the implications of permitting States to totally prohibit the use of telemarketing in any form will have a far reaching impact upon hundreds of thousands of entities and individuals who use telemarketing in the United States. Telemarketing is used to sell or solicit almost everything in the United States from the sale of fungible goods to the solicitation of charitable contributions.

The issue in the case at bar was further aggravated by the fact that the State of West Virginia has never attempted in any manner to prohibit the use of telemarketing for any other defined entity, or for any other goods and services. West Virginia only prohibits the use of telemarketing to individuals or entities who attempt to market preneed funeral goods or services. The State did assert the dual police power rationales of



protecting privacy rights and protecting against undue influence or fraud. However, the State also continued to assert its right to regulate because of the nature and type of the goods being sold. The State, for evidently paternalistic reasons, asserts that preneed funeral solicitors would be offensive to individuals in the sanctity of their own homes.

In its legal analysis which upheld the State's regulation, Judge Hall in issuing the opinion of the Fourth Circuit analogized preneed telemarketing regulation with the face-to-face solicitation of business opportunities by lawyers, a specific type of regulation which has previously been upheld by this Court. Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978).

However, in Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978), this Court



upheld the bar disciplining of a lawyer who solicited business face-to-face with a potential client. This Court emphasized as the principle basis for its decision in Ohralik, the inherent opportunity for overreaching in a face-to-face setting. In this limited regard, the State's substantial governmental interest in protecting potential clients of attorneys outweighed the commercial First Amendment right to solicit in a particular setting. This Court emphasized the unique nature of in-person face-to-face solicitation which does not provide any coercion protections or avoidance opportunities for the potential customer.

However, contrary to Judge Hall's legal rationale, this Court apparently already has stated (albeit dicta) that the powers of a State to prohibit totally a particular method



of solicitation may very well be restricted to in-person face-to-face solicitation.

In Shapero v. Kentucky Bar Association, 108 S.Ct. 1916 (1988), this Court once again overturned an absolute State prohibition on a form of professional sales solicitation. In Shapero, a Kentucky lawyer was delivering a targeted mail advertising for the purposes of soliciting legal clients. In applying the legal rationale of Central Hudson Gas v. Public Service Commission, 447 U.S. 557 (1980) and Ohralik, this Court stated that when attempting to determine the potential for overreaching or undue influence, the "mode of communication makes all the difference". Shapero v. Kentucky Bar Association, 108 S.Ct. 1916 at 1922 (1988).

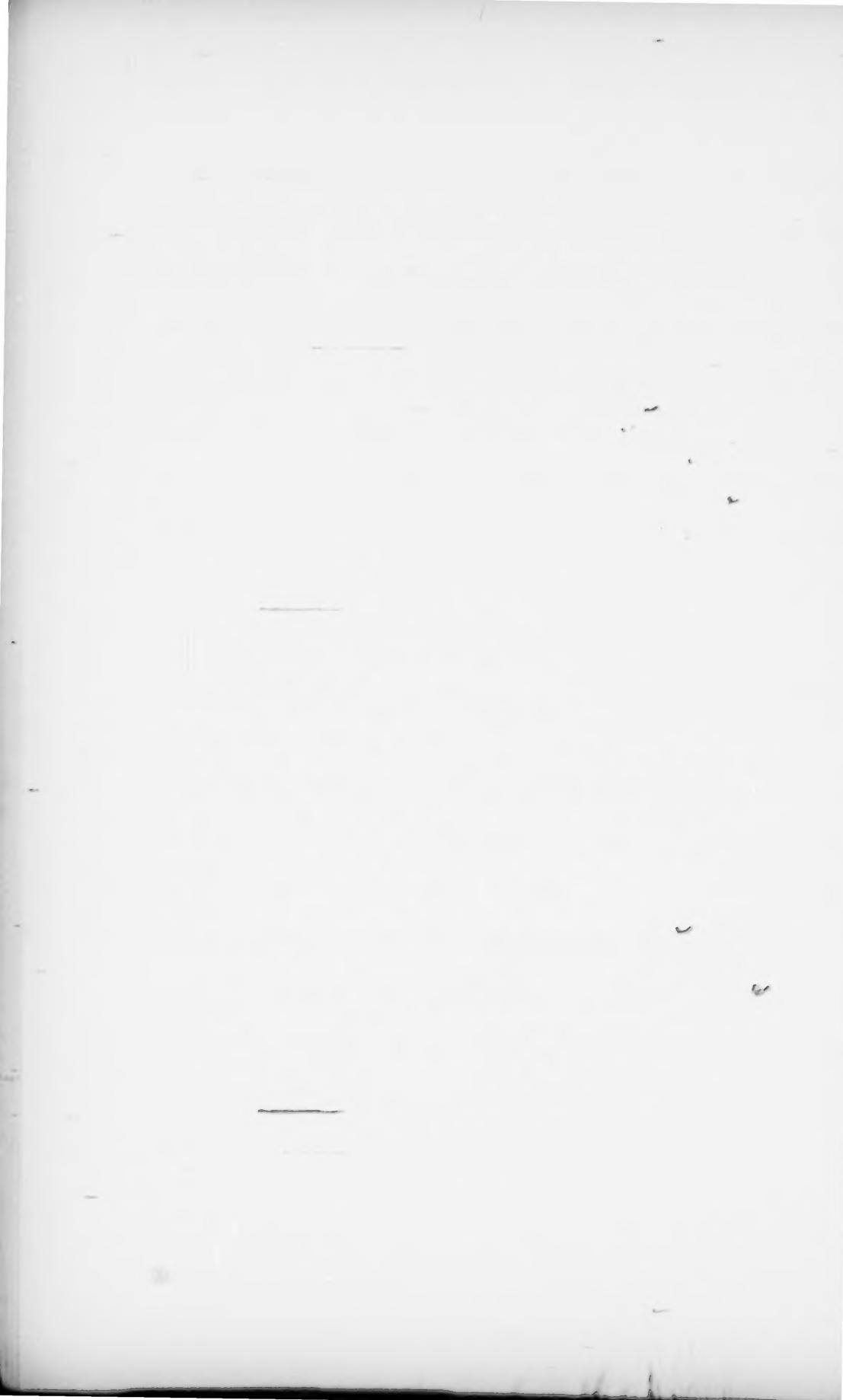
This Court's reasoning in Ohralik for upholding the authority of a State to totally



prohibit a form of commercial speech was based upon the nature of in-person solicitation which could be inherently coercive because of the personal presence of the soliciting party.

In Shapero while this Court noted that even targeted mailings could be subject to abuses, the opportunities for isolated abuses or mistakes could not and would not justify a total ban on that mode of protected commercial speech.

While this Court has not directly addressed telephone solicitation in the context of a commercial free speech regulation, it would appear that the rationale that this Court used in Ohralik to permit a total prohibition on face-to-face solicitation simply does not apply in the situation of telemarketing. The recipient of a telemarketing solicitation can merely hang



up on the telemarketer just as the letter recipient in Shapero could discard the letter.

Finally the Petitioner would point out that as in Shapero, the record in the case at bar is totally devoid of either a legislative finding regarding the adverse effects of telemarketing or face-to-face solicitation in the sale of preneed funeral goods and services. The record is also totally devoid of any evidence at the trial of this matter which would disclose that the parties who are prohibited from telemarketing and preneed solicitation on a door-to-door basis have in fact exhibited or exercised any coercion, fraud, or undue influence in the past upon the consuming public.

Clearly Judge Hall's legal rationale for upholding the State's telemarketing ban is not in conformance with this Court's



decision in Shapero v. Kentucky Bar Association. Furthermore the asserted State interests for imposing the ban are totally unsupported by the record in addition to their conspicuous absence from any legislative intent or history. In regulating commercial free speech, a State has the burden of providing evidence justifying restrictions on speech. Landmark Communications, Inc. v. Commonwealth of Virginia, 435 U.S. 829 (1978).

Petitioner submits for the reasons stated herein that the issue relating to the content based regulatory prohibitions upon telemarketing are important federal questions which have not been, but should be, settled by this Court. Petitioner also submits that the Court below appears to have decided this issue in a manner which is inconsistent with opinions uttered previously by this Court.



ISSUE NO. 2

In the regulation of commercial speech which is not content neutral, does a total prohibition on an otherwise permissible mode of advertising without a showing that the fashioned regulation is necessary or reasonable in light of the enunciated State interest, constitute regulation in a manner which is narrowly tailored to achieve the State's desired objectives? Central Hudson Gas v. Public Service Commission, 447 U.S. 557 (1980) and Board of Trustees of the State University of New York v. Fox, ____ U.S. ____ Case No. 87-2018 (decided June 29, 1989).

ISSUE NO. 2

This Court's decision in Central Hudson Gas v. Public Service Commission, 447 U.S. 557 (1980) outlines the applicable standards of review in situations where States seek to regulate the exercise of commercial speech.

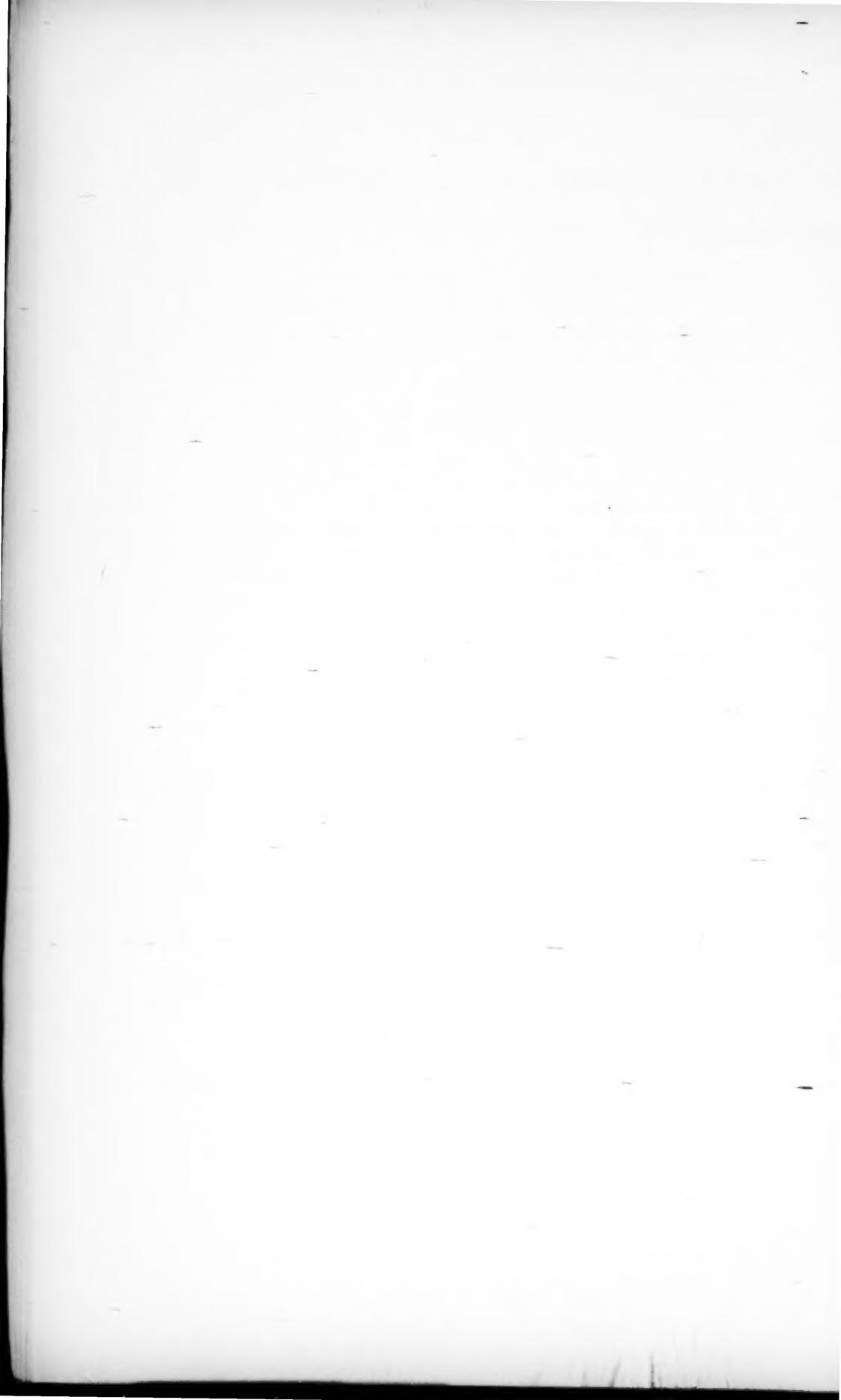


In Central Hudson Gas v. Public Service Commission, this Court stated:

"In commercial speech cases, a four part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For that provision, it at least must concern lawful activity and must not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted and whether it is not more extensive than is necessary to serve that interest." Central Hudson Gas v. Public Service Commission, 447 U.S. at 556.

In Board of Trustees of the State University of New York v. Fox, ____ U.S. ____

1989, Case No. 87-2013 (decided June 29, 1989), this Court for the first time directly addressed the necessity of applying at least restrictive test on regulatory alternatives for commercial speech, particularly as those



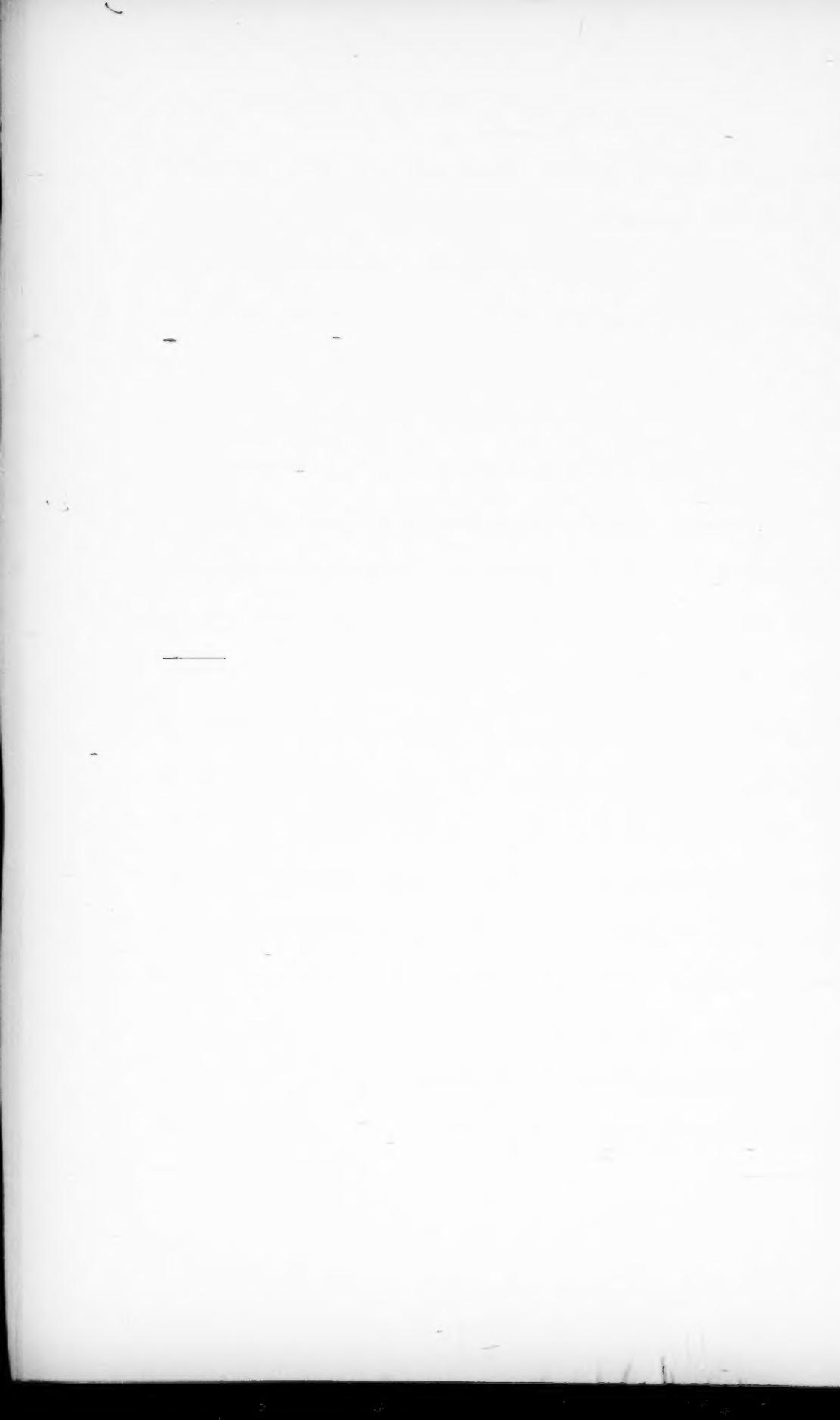
concepts were being applied by the several Courts of Appeals in the United States.

This Court rejected a structured test which would require the Courts of Appeals to uphold only the absolutely least severe method of commercial speech regulation which would achieve the desired goals of the State.

However, the Court clearly stated that a "reasonable fit" between the government's ends and the means chosen to accomplish those ends must be established by the State.

Posadas de Puerto Rico Association v. Tourism Company of Puerto Rico, 478 U.S. 328 at 341; In Re R.M.J., 455 U.S. 191 (1982) at 208; Board of Trustees of the State University of New York v. Fox, ___ U.S. ____ (1989), Case No. 87-2013 (decided June 29, 1989); slip opinion, pages 5 to 11.

Furthermore, Justice Scalia in delivering the opinion of the Court



enunciated that the "reasonable fit" standard established by Board of Trustees of the State University of New York v. Fox was not to be construed or applied as a return to a mere rational basis test of the type which is generally applied to a State's legislative regulation of commercial or economic endeavors.

Justice Scalia also pointed out that commercial speech restrictions previously disallowed by the Supreme Court under the Central Hudson analysis had been substantially excessive, disregarding far less restrictive and more precise means. Shapero v. Kentucky Bar Association, 486 U.S. ___, 108 S.Ct. 1916 (1988); slip opinion, page 9.

However, at the same time, this Court has previously overturned State regulations of commercial free speech which are absolute



prohibitions upon the exercise of some particular form of communication in the event some other method of regulation will achieve State interests. Shapero v. Kentucky Bar Association, 486 U.S. ____, 108 S.Ct. 1916 (1988); Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985); In Re R.M.J., 455 U.S. 191 (1982); and Bates v. State Bar of Arizona, 433 U.S. 350 (1970).

Justice Scalia expressly rejected any attempted correlation between the "reasonable fit" test enunciated by Board of Trustees of the State University of New York v. Fox and the "rational basis" test used to analyze Fourteenth Amendment equal protection considerations for general economic regulations. Justice Scalia stated as follows:

"We reject the contention that the test we have described is overly permissive. It is far



different, of course, from the rational basis test used for Fourteenth Amendment equal protection analysis. See e.g. Railway Express Agency, Inc. v. New York, 336 U.S. 106, 109-110 (1949). There it suffices if the law could be thought to further a legitimate governmental goal, without reference to whether it does so at inordinate cost. Here we require the government goal to be substantial, and the cost to be carefully calculated. Moreover, since the State bears the burden of justifying its restrictions, see Zauderer, supra at 647, it must affirmatively establish the reasonable fit we require." Board of Trustees of the State University of New York v. Fox, U.S. (1989), Case No. 87-2013 (decided June 28, 1989); slip opinion at page 10. (underscore supplied)

In the case at bar, the government's goal as set forth in the statute is to protect and preserve the trusted monies. The Petitioner submits that the potential cost of this regulation of commercial speech which conveys totally truthful service and product information is not carefully calculated and



furthermore is not a "reasonable fit" designed to achieve the substantial State interests in question.

If on the other hand the Courts are to accept the State's undocumented and factually unsupported assertions that the statute is instead directed at protecting the privacy of the home and consumer rights, then the critical question now presented to this Court comes to the forefront.

If the State proceeds to totally prohibit an accepted truthful mode of commercial advertising for only one type of goods or services, to what extent must the State be required to support factually or procedurally its content based regulation?

If the record and statutory intent are devoid of any such factual or procedural findings, Petitioner submits that Federal Courts will be endorsing a "rationale basis"



economic regulation test in instances where fundamental First Amendment rights demand a more stringent test. This ultimate result as presented by the case at bar is directly contrary to this Court's ruling in Board of Trustees of the State University of New York v. Fox, ___ U.S. ___ 1989, Case No. 87-2013 (decided June 29, 1989).

Contrary to this Court's decisions, the Fourth Circuit has made no attempt to determine whether or not the State regulation in question is a "reasonable fit" or whether the regulation is more extensive than necessary.

Justice Scalia cites Posadas de Puerto Rico Association v. Tourism Company of Puerto Rico, 478 U.S. at 841:

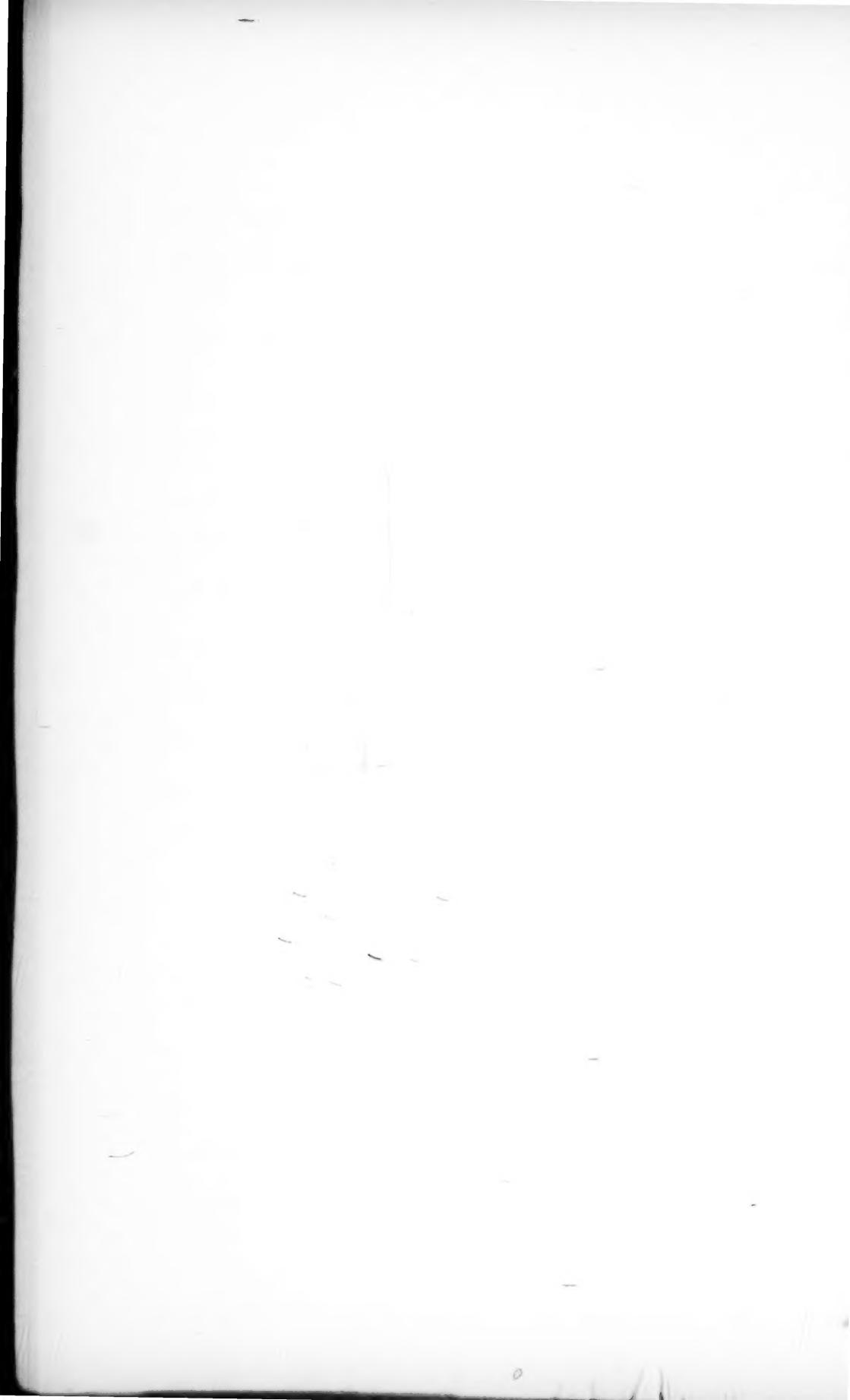
"A fit that is not necessarily perfect but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served, "



In the decision of In Re R.M.J. supra at 208, this principle was also elaborated upon as follows:

"That employs not necessarily the least restrictive means but, as we have put in the other context discussed above, a means narrowly tailored to achieve the desired objective."

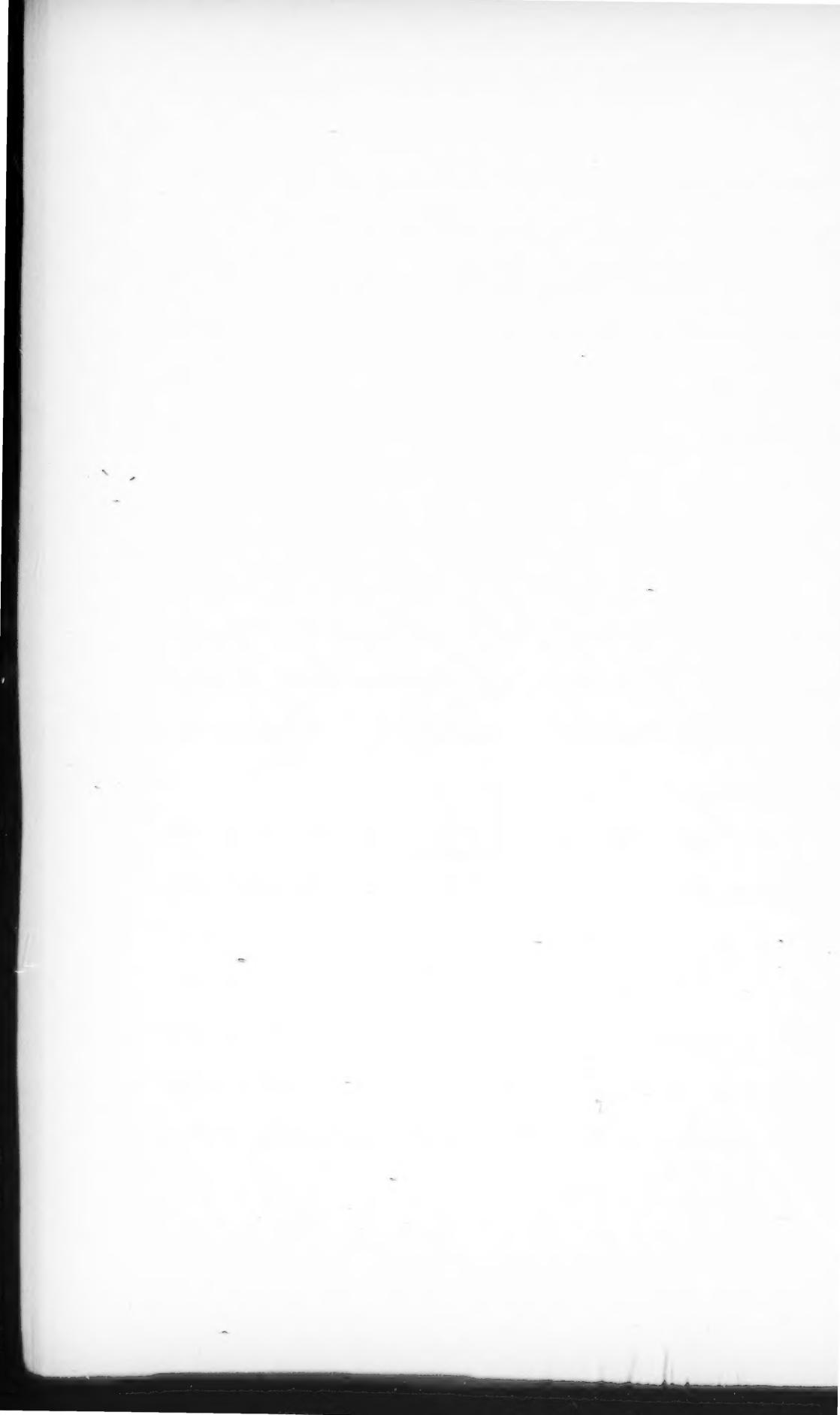
If the interest served is to protect against the improper use of trusted funds, then the solicitation prohibitions are irrelevant. If the interest served is the right of privacy, how can the prohibition of only one type of telemarketing or one type of door-to-door solicitation protect individuals in their homes against unwanted intrusion? And finally if in fact the right of privacy is being encroached upon by the Petitioner, why is there no factual support for this contention in the record and why is there not only an absence of legislative factual support but an absence of even a legislative



acknowledgment of these interests by way of any stated intent in the statute?

The Petitioner asserts that it is a development of these types of considerations which a "reasonable fit" or "narrow tailoring" standard demands. To allow a State to regulate against First Amendment rights without this analytical consideration is contrary to numerous decisions by this Court and is in fact tantamount to an acceptance by default of nothing more than a "rationale basis" economic regulation standard.

In light of this Court's recent decision in Board of Trustees of the State University of New York v. Fox, ___ U.S. ___ (1989), Case No. 87-2013 (decided June 29, 1989), which addressed the years of conflicting and confusing federal court decisions regarding the application of the Central Hudson least



restrictive tests, the Petitioner now urges that this Court address the fundamental underlying question of whether or not a State can presume that certain types of truthful speech are inherently misleading or harmful.

No matter how it is construed or justified, the creation of a regulatory remedy for a problem which does not or may not in fact exist is per se unreasonable, irrational and unconstitutional as a restraint upon commercial speech without an assertion of any substantial State interest. Whenever a regulatory remedy is implemented only upon a presumption that the speech regulated is harmful, First Amendment rights and the tests which this Court has designed to protect those rights become nothing more than an academic illusion.

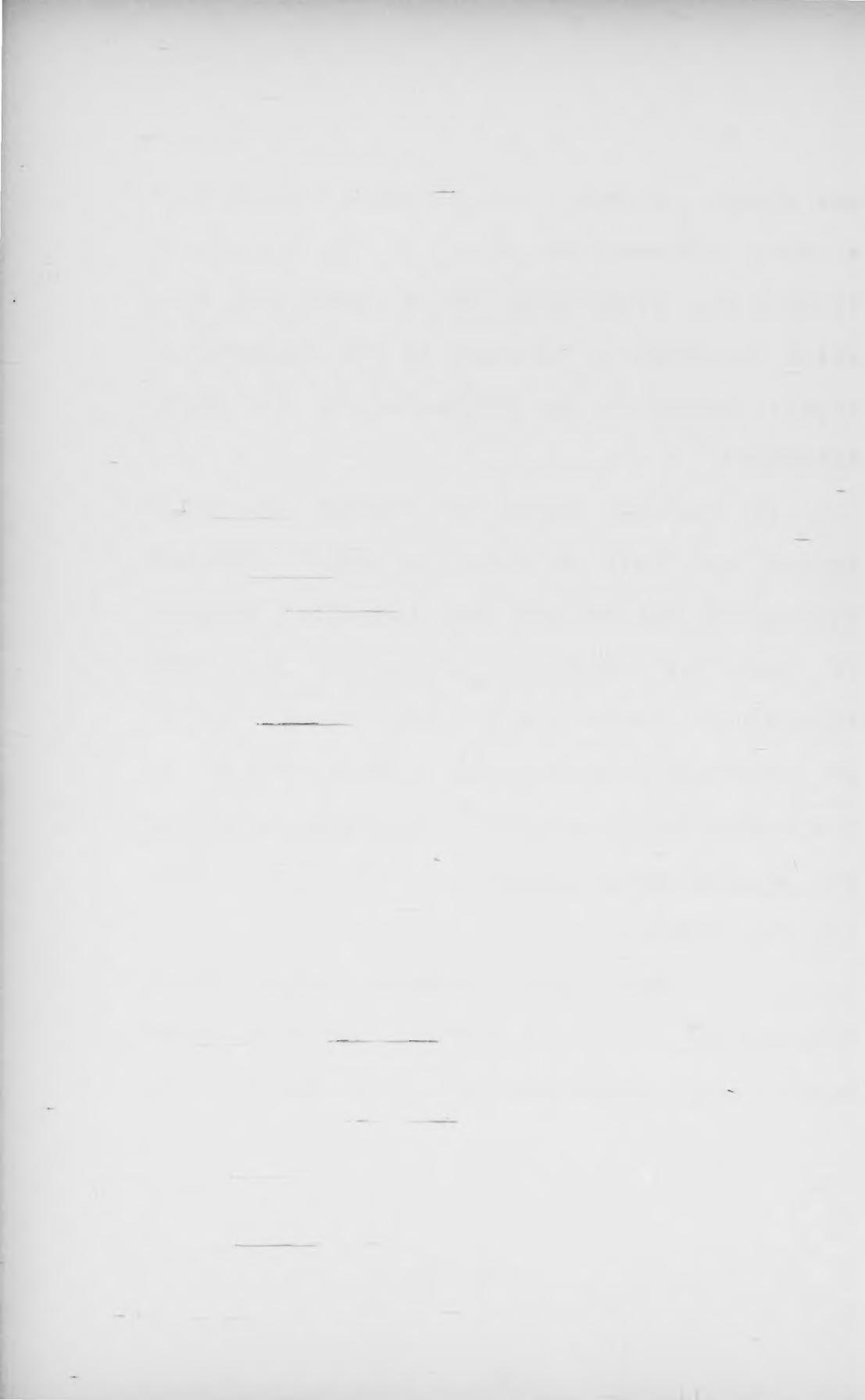
To prohibit a form of speech after an analysis of whether or not it is harmful is



one thing. However, to prohibit speech upon a mere presumption that it is false or harmful is censorship of a type and form which is directly contrary to the fundamental rights sought to be protected by the First Amendment.

If certain types of speech by their nature are self evident in their inherent misleading nature and not therefore subject to detailed State findings, then some fundamental tests identifying these "forms" of inherently misleading speech should be elaborated by this Court. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 652-653 (1985).

Petitioner submits that these fundamental issues of federal law have never been fully addressed by this Court even



though this Court in its last term noted probable jurisdiction to resolve this issue in Oring v. California State Bar, No. 87-1224 (appeal dismissed January 23, 1989).

Because of this Court's technical basis for dismissing Oring v. California State Bar, the Petitioner urges that the case at bar affords an excellent opportunity for this Court to address this fundamental issue for the first time.

ISSUE NO. 3

Does the legitimate State interest in protecting the right of privacy in the home when balanced against commercial rights of free speech guaranteed by the First Amendment permit a State to impose an absolute regulatory prohibition on door-to-door or telephonic solicitation of preneed funeral goods and services, when at the same time the State allows with absolutely no regulation

telephonic and door-to-door solicitation for all other types of goods and services? Martin v. Struthers, 319 U.S. 141 (1943) and Frisby v. Schultz, 56 U.S.L.W. 4785 (June 28, 1988).

ISSUE NO. 3

The importance of uninvited in-home solicitation as a means of disseminating information has been previously addressed by this Court in the case of Martin v. Struthers, 319 U.S. 139 (1943). It is interesting to note that even with the immense body of new law and the legal evolution which has occurred in the area of First Amendment commercial regulation, this Court has never overturned its decision in Martin v. Struthers.

In Martin v. Struthers, this Court found an Ohio city ordinance in violation of the First Amendment to the United States



Constitution because the ordinance absolutely prohibited door-to-door uninvited solicitation. The Court in its holding addressed the fact that uninvited door-to-door solicitation has been prevalent for centuries throughout this nation and that it has provided a very efficient and necessary means of communicating information and ideas to the general public. The court went on to hold that it is the right of the individual master of each household to determine whether or not they wish to hear the pitch of the solicitor and it is not up to the leaders of the community to predetermine what information the individuals of the community may acquire. This Court stated as follows:

"Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of the free society that putting aside reasonable



police and health regulations at the time and manner of distribution, it must be fully preserved." Martin, 319 U.S. at 147.

The mere remote possibility that information could be misleading or offensive to the general public, or that isolated abuses or mistakes have occurred has never been a sufficient basis for the enactment of governmental regulation prohibiting in their entirety certain modes of commercial speech. In Re R.M.J., 455 U.S. 191 at 203 (1982); Shapero v. Kentucky Bar Association, 486 U.S. ____ 108 S.Ct. 1916, 1923 (1988).

The State of West Virginia in the case at bar has prohibited in its entirety unrequested in-home solicitation or telephonic solicitation for only a single particular type of goods and services while at the same time the State continues to



permit in-home or telephonic solicitation for any other type of goods and services.

In its decision below, the Fourth Circuit cited the State's interest in protecting the right of privacy as a sufficient interest to support the regulation of commercial speech.

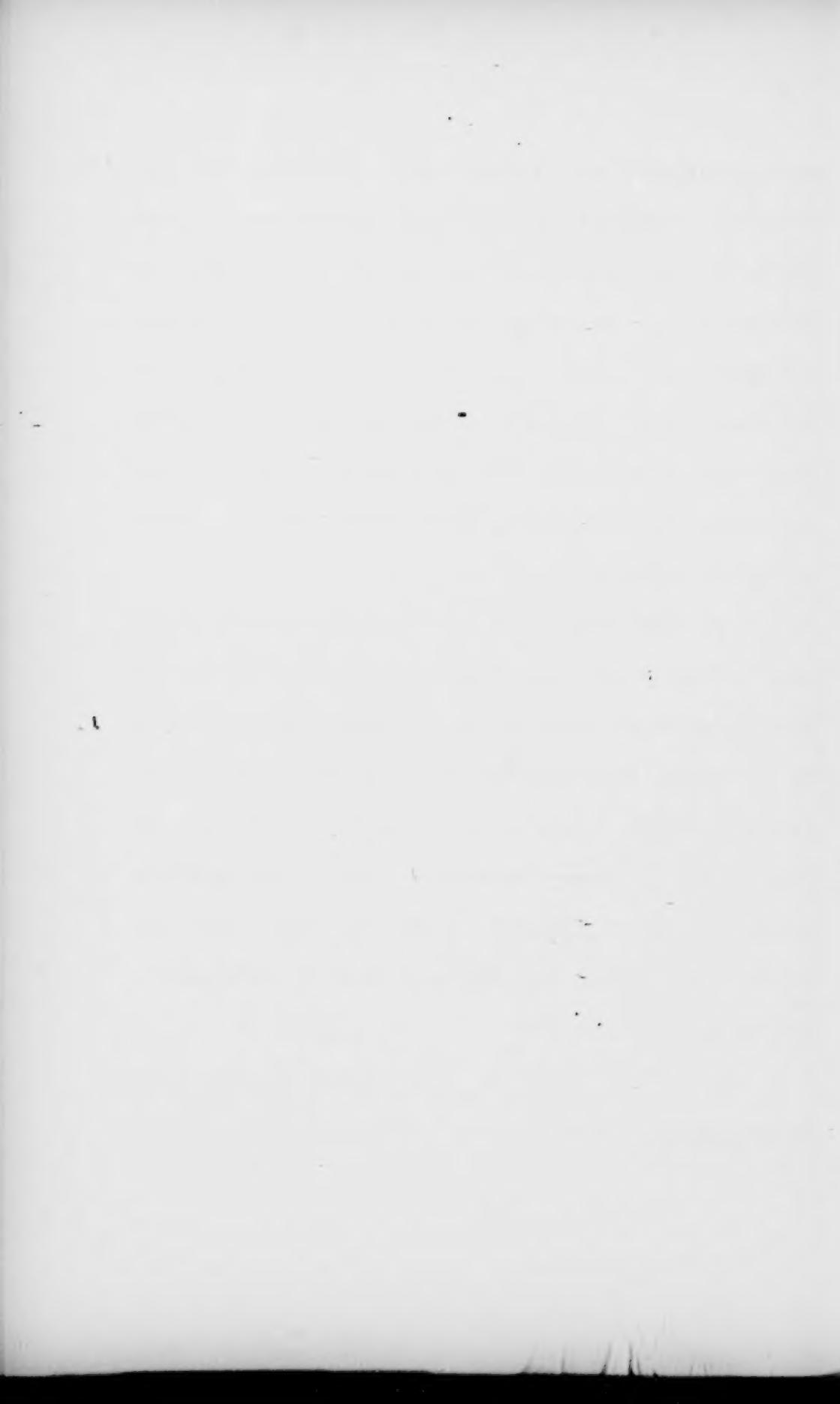
Assuming for argument's sake, that the privacy of persons in their homes is encroached upon by the act of a salesperson perpetrating an unsolicited door-to-door visit or telephone solicitation, if the State truly seeks to protect this right of privacy, it would prohibit all door-to-door or telephone solicitation in West Virginia not merely door-to-door or telephone solicitation for certain defined funeral goods and services. Obviously what the State is really seeking to do is shield consumers from



door-to-door or telephone solicitation of preneed funeral goods and services. The State's rationale is at worst an effort to politically protect funeral homes against competition, and at best an attempt to further the State's paternalistic opinion that the marketing of this type of goods and services is offensive when done door-to-door or by telephone.

If the State in fact sought to protect the privacy of the home, the regulation in question would not restrict the dissemination of certain information in a prescribed form. Instead, the regulation would prohibit the act of door-to-door or telephonic solicitation itself. It is the act of soliciting which encroaches upon a consumer's privacy.

Only in Ohralik v. Ohio State Bar Association has this Court absolutely



prohibited in-person solicitation or telephone solicitation based upon the content of the solicitation and its potential for imposing harm upon the persons solicited. However, even Ohralik is not similar to the case at bar since all attorneys similarly situated in Ohralik regardless of the type of legal services they seek to market are prohibited from in-person face-to-face solicitation of prospective clients. In the case at bar, any goods and services may be sold door-to-door or by telephonic solicitation in the State of West Virginia except for preneed funeral goods and services. Furthermore, at the same time, a special subclass of preneed funeral goods and services (or cemeteries which sell traditional cemetery item preneed funeral goods and services) all of which pose the same potential hazards to the asserted State



interests are totally exempt from the regulatory prohibitions in the statute. See West Virginia Code § 47-14-2 (1983).

As of the date of this petition, the Fourth Circuit and the Seventh Circuit have both sanctioned underinclusive First Amendment regulation on the basis of justifications applicable only to all inclusive regulation. Curtis v. Thompson, 840 F.2d 1291 (7th Cir. 1988); Guardian Plans, Inc. v. Teague, 870 F.2d 123 (4th Cir. 1989); and National Funeral Services v. Rockefeller, 870 F.2d 136 (4th Cir. 1989).

The Seventh Circuit upheld a prohibition against solicitation through the mail that applied solely to real estate agents, stating that it would not "second-guess the Illinois General Assembly and hold the statute unconstitutional merely because we may believe that Illinois could have prohibited



more expressive conduct in an effort to achieve its stated purposes." Curtis v. Thompson, 840 F.2d at 1303.

The need for a uniform federal rule in areas of underinclusive commercial speech regulation is required in order to reconcile the disparate results among the various federal circuits and their apparent refusal to apply this Court's opinions in Linmark Associates v. Willingboro Township, 431 U.S. 85 (1977) and Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983). Content based regulation must be sustained if at all on the basis of the content of the speech and not the form. The State of West Virginia has never attempted to regulate the form of door-to-door solicitation or telemarketing. If legitimate State interests are proffered in support of regulating the form of speech, then this Court's decision in Linmark would



appear to dictate in favor of an all inclusive form based regulation.

ISSUE NO. 4

In regulating against a particular commercial activity, can the State's police powers regulate only a portion of those individuals who act in a manner which threatens legitimate State interests while at the same time exempting from regulation, without any rational basis and contrary to statutory intent, other individuals or entities who also undertake the same prescribed deleterious activities? New Orleans v. Dukes, 472 U.S. 297 (1976).

ISSUE NO. 4

West Virginia Code § 47-14-1 establishes the legislative intent for West Virginia Code § 47-14-1 et seq.:

"It is contrary to public policy for any person to receive, hold, control, or manage funds or proceeds received from the sale of or from a contract to sell funeral



services, funeral goods, burial goods, or any one or combination of them whether payments of the same are made either outright or on an installment basis prior to the death of the person or persons so purchasing them or for whom they are purchased unless that person holds, controls, or manages those funds subject to the limitations and regulations prescribed by this article.

It is the legislative intent that the provisions of this article shall be construed as a limitation on the manner in which a person is permitted to accept funds in prepayment of funeral services to be performed in the future or the funeral or burial goods to be used in connection with the funeral or final disposition of the human remains so that at all times, members of the public may have an opportunity to arrange and pay for funerals for themselves and their families in advance of need while at the same time providing all possible safeguards whereunder such prepaid funds cannot be dissipated, whether intentionally or not in order that such funds are available for the payment of funeral services so arranged. Further, it is the legislative intent that no person may offer, sell, or negotiate for the sale of a preneed funeral service contract to anyone who is not licensed under this article."



The general standard which federal courts exercise in reviewing economic regulations promulgated by States has been established by this Court in its decision of New Orleans v. Dukes, 427 U.S. 297 (1976) where this Court stated:

"a judiciary may not sit as a super legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither effect fundamental rights nor proceed along suspect lines. See e.g. Daybright Lighting v. Missouri, 342 U.S. 421, 423 (1952); in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment. See e.g. Ferguson v. Skrupa, 372 U.S. 726, 732 (1963)." See New Orleans v. Dukes, Id. at page 302.

In New Orleans v. Dukes this Court indicates that unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage; federal



courts presume Constitutionality of statutory discriminations. See New Orleans v. Dukes, 472 U.S. 297 at page 303.

The District Court and Fourth Circuit Court of Appeals in their decisions below analyzed the Petitioner's Fifth and Fourteenth Amendment arguments if at all based upon a general "rational basis" review of the legislation. Petitioner submits that this lesser standard was improper given the standard established by this Court in New Orleans v. Dukes regarding the potential impact of economic regulation upon personal fundamental rights.

Petitioner maintained below that the personal fundamental rights alluded to by this Court in New Orleans v. Dukes included First Amendment rights of commercial speech. The implication of this fundamental right dictated a more careful scrutiny of the



discriminatory provisions of the economic regulation set forth by West Virginia Code § 47-14-1. Petitioner submits that the discriminatory distinctions made by the statute should be viewed not under a general "rationale basis" theory as established by New Orleans v. Dukes, but instead by a judicial scrutiny tantamount to a standard similar to any other judicial review of commercial speech regulation.

Since the stated sole and predominant purpose of the statute is to protect against the depletion of preneed funds, the statute itself is irrational in its underinclusive exemption of certain preneed sellers (cemeteries) and certain preneed funeral goods and services as set forth in West Virginia Code § 47-14-2. The State has never proffered any distinction as to why contract purchasers who pay funds for these



same preneed goods or services are not also to be protected against the dissipation or depletion of their funds. Petitioner can find no basis by which the record or legislative history supports any discriminatory distinction between the need to preserve funds paid in anticipation of the future delivery of a casket as opposed to the future delivery of a headstone or a burial space in a vault or columbarium which may not even have been built at the time that the burial space was sold.

In the State of West Virginia, funeral directors are those individuals who are licensed by the State to make arrangements for, prepare for, and administer those functions necessary for the disposition of human remains. Funeral directors arrange services, prepare bodies, and sell specific goods to consumers for the final disposition



of human remains. Cemeteries, on the other hand, are those entities which provide repositories for human remains, including internment rights, columbariums, vaults, and other available space for the storage of human remains or the ashes of cremated human remains. There is, however, a vast amount of overlap in goods and services which are sold by funeral directors and those goods and services which are sold by cemeterians. For example, stones, bronze, markers, vaults and caskets are sold by both cemeteries and funeral directors in West Virginia.

The Petitioner maintains that the Circuit Court analysis of the Petitioner's Fifth and Fourteenth Amendment arguments never should have proceeded under the general rationale basis tests of New Orleans v. Dukes. This Court clearly stated that the legal rule of New Orleans v. Dukes does not

apply in situations where fundamental rights are involved. New Orleans v. Dukes, at 302.

ISSUE NO. 5

Do United States Supreme Court decisions require a Supremacy Clause preemption analysis to also consider the effect of inferior legislation upon a clearly stated superior federal policy? Hines v. Davidowitz, 312 U.S. 52 (1941); Commonwealth of Pennsylvania v. Nelson, 350 U.S. 497 (1956); and Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984).

ISSUE NO. 5

In the Court's ruling below, the Fourth Circuit Court of Appeals improperly characterized the position of the Petitioner regarding its supremacy clause preemption arguments as follows:

"NFS's first contention is that the funeral rule, promulgated by the FTC, so pervasively regulates the funeral industry that it



preempts West Virginia's extensive regulation of preneed funeral contracts." National Funeral Services v. Rockefeller, 870 F.2d 136 at 138-139 (1989)

While the Court later hinted at an analysis which considered whether West Virginia Code § 47-14-1 et seq. was in conflict with 16 C.F.R. § 453. The Court never considered the underlying policy goals of 16 C.F.R. § 453.

This quotation and the Court's failed "conflict" analysis personifies both the misapprehension of the Fourth Circuit Court of Appeals regarding the Petitioner's supremacy clause arguments and further signifies that the lower Court's ultimate decision on this issue is one which is in direct conflict with applicable decisions of this Court.



The Petitioner's position has never included an assertion that the Federal Trade Commission's regulation at 16 C.F.R. 453 (1983) so pervasively regulated the funeral industry so as to preempt concurrent or ancillary regulation by the State of West Virginia.

The Petitioner's position is that the manner and form of regulation adopted by the State of West Virginia in regards to the prohibition of certain types of solicitation at West Virginia Code § 47-14-10 directly and seriously frustrate a superior federal policy enunciated by the Federal Trade Commission regulation set forth at 16 C.F.R. 453 (1983).

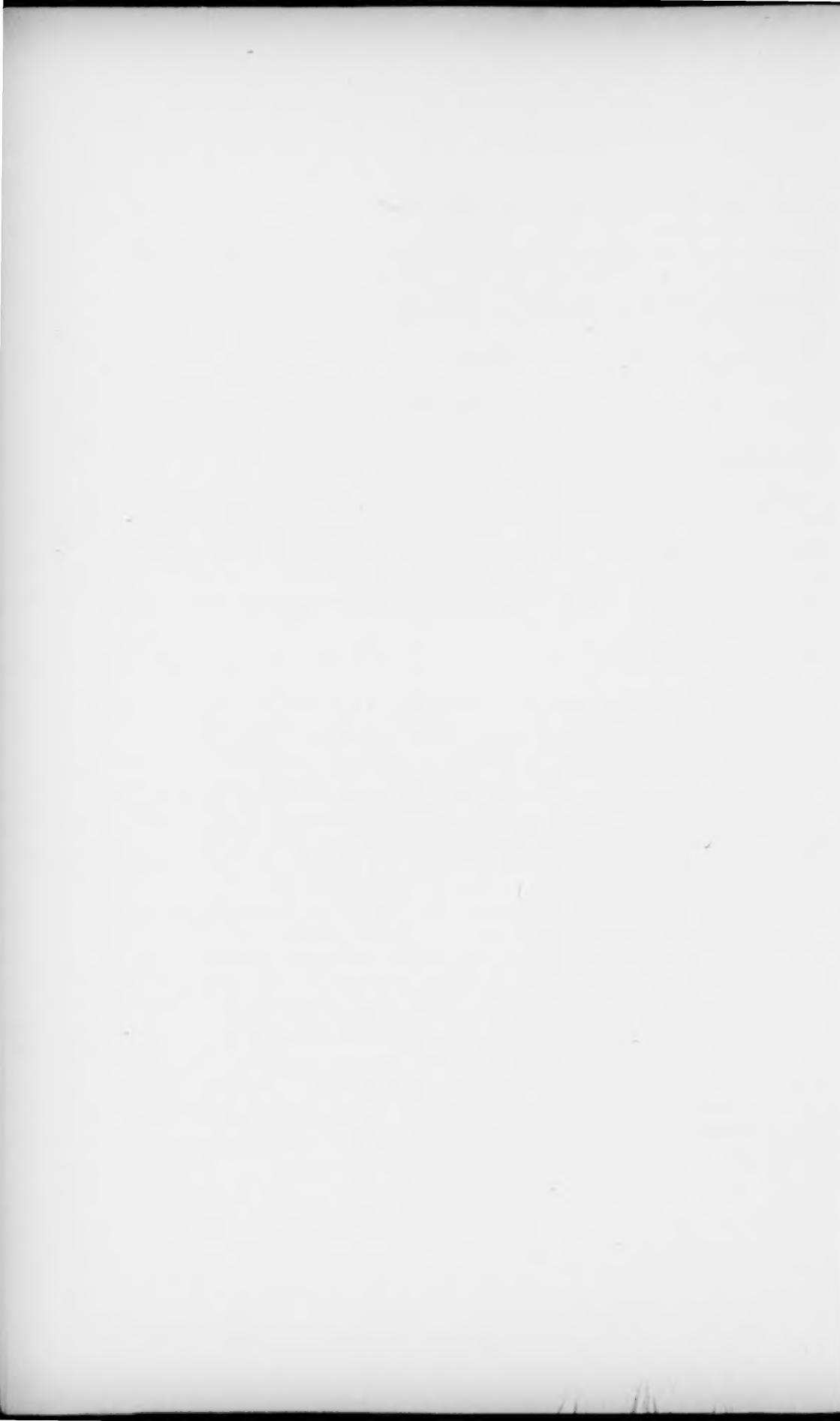
Even in situations where Congress has not totally preempted State action, this Court has elaborated instances of federal preemption under the supremacy clause in situations where a superior federal policy



may be frustrated by the State regulation in question. Hines v. Davidowitz, 312 U.S. 52 (1941); and Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984).

This Court in the decision of Capital Cities Cable, Inc. v. Crisp reviewed a State interest served by an Oklahoma advertising ban as applied to the importation of distant cable television signals. The Court stated as follows:

"When this limited interest is measured against the significant interference with the federal objective of insuring widespread availability of diverse cable services throughout the United States - an objective that will unquestionably be frustrated by strict enforcement of the Oklahoma statute - it is clear that the State's interest is not of the same stature as the goals identified in the FCC's rulings and regulations. As in Midcal Aluminum, therefore, we hold that when, as here, a State regulation squarely conflicts with the accomplishment and execution of the full purposes of federal law,



and the State's central power under the Twenty-First Amendment of regulating the times, places, and manner under which liquor may be imported and sold is not directly implicated, the balance between State and federal powers tips decisively in favor of the federal law, and enforcement of the State's statute is barred by the supremacy clause." (underscore supplied)

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984). (underscore supplied)

In the decision of Capital Cities Cable, Inc. v. Crisp, Congress clearly did not totally preempt State regulation in the area of cable television regulation or alcohol advertising. There was also never any allegation of a direct conflict between the provisions of a State statute which required the deletion of all advertisements for alcoholic beverages contained in out-of-state cable television signals and the Federal Trade Commission's regulations dealing with cable television.



In fact the Capital Cities Cable, Inc. decision was very similar to the case at bar in that the argument of preemption rested with the State regulations frustration of a fundamental policy upon which the promulgation of Federal Communication Commission rulings and regulations had been based. That underlying policy was a very general public policy of insuring the widespread availability of diverse cable television service throughout the United States.

The Federal Trade Commission's funeral industry rule discloses that the preeminent underlying policy is to promote and effectuate the dissemination of pricing and product information in the funeral industry. While the language and requirements of the rule itself may not conflict directly with West Virginia Code § 47-14-1 et seq., the



Petitioner submits that the State's regulatory structure clearly impedes the full implementation, accomplishment, and execution of the objectives of superior federal law as enunciated by 16 C.F.R. 453 (1983).

Active door-to-door and telephone solicitation is the predominant, and perhaps the exclusive, avenue by which product and pricing information is provided to funeral consumers in the State of West Virginia. Petitioner agrees that the provisions of West Virginia Code § 47-14-1 do not specifically conflict with any particular provisions of the Federal Trade Commission's Rule since the Federal Trade Commission's rule only requires price disclosure when contact is initiated by the consumer.

However, the Supremacy Clause of the United States Constitution still prohibits the State regulatory scheme since it attempts



to restrict the dissemination of funeral product and pricing information to the consuming public without the enunciation of any substantial State interest for doing so.

It is the dissemination of precisely that same type of information which the Federal Trade Commission found necessary in order to alleviate the economic imperfections in the funeral industry markets. The opinion of the Fourth Circuit Court of Appeals clearly indicates its failure to address this question and that failure is directly inconsistent with prior decisions by this Court.



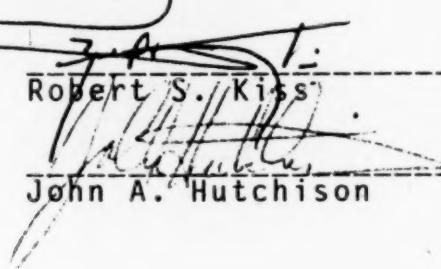
CERTIFICATE OF SERVICE

Pursuant to Rule 28 of the United States Supreme Court, I, Robert S. Kiss, an attorney licensed to practice before the Court do certify under oath that I have served three (3) copies of the Petitioner's Petition for a Writ of Certiorari on the Respondents, John D. Rockefeller, Governor of the State of West Virginia (replaced by Gaston Caperton), Lawrence Barker, Commissioner of the Department of Labor for the State of West Virginia and the Department of Labor for the State of West Virginia by serving this date three (3) copies of the attached Petition for a Writ of Certiorari by depositing said copies in the United States mail, first class postage prepaid addressed to Charles G. Brown, Attorney General for the State of West Virginia and counsel for the Respondents at

the West Virginia Attorney General's Office,
Capitol Building, Charleston, West Virginia
25305. I further certify under oath that all
of the parties who appeared in this action
before the Fourth Circuit Court of Appeals
which are required to be served have been
served and that the aforesigned parties are
all represented by the Attorney General of
the State of West Virginia and are a complete
and total listing of all said parties to this
action before the United States Court of
Appeals for the Fourth Circuit.



Robert S. Kiss



John A. Hutchison

STATE OF WEST VIRGINIA,
COUNTY OF RALEIGH, TO-WIT:

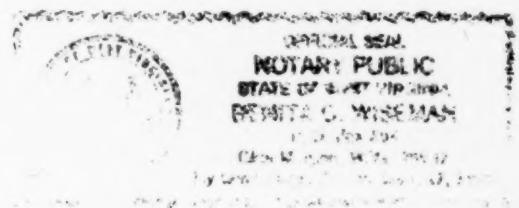
I, Benita D. Wiseman, a

Notary Public in and for said county and state, do hereby certify that ROBERT S. KISS and JOHN A. HUTCHISON whose names are signed to the foregoing writing bearing date the 25th day of August, 1989, has this day acknowledged the same before me in my said county.

Given under my hand this the 25th day of August, 1989.

My commission expires: 9-17-96

Benita D. Wiseman
Notary Public



89-639 (9)

NO. _____

Supreme Court, U.S.
FILED

AUG 29 1989

JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

NATIONAL FUNERAL SERVICES, INC.

Petitioner,

v.

JOHN D. ROCKEFELLER, ET AL

Respondent.

APPENDIX

BOOK I
Pages A1 - A122

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John A. Hutchison
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124 pp



**United States Constitution Article One
Section 8, Clause 1. Powers of Congress;
Levy of Taxes for Common Defense and General
Welfare; Uniformity of Taxation**

The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

**United States Constitution Article One
Section 8, Clause 2. Borrowing Money**

To borrow Money on the credit of the United States;

**United States Constitution Article One
Section 8, Clause 3. Regulation of Commerce**

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;



United States Constitution Article Six

Section 1, Clause 2. Supreme Law of Land

This constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Constitution Bill of Rights

Article I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.



United States Constitution Bill of Rights

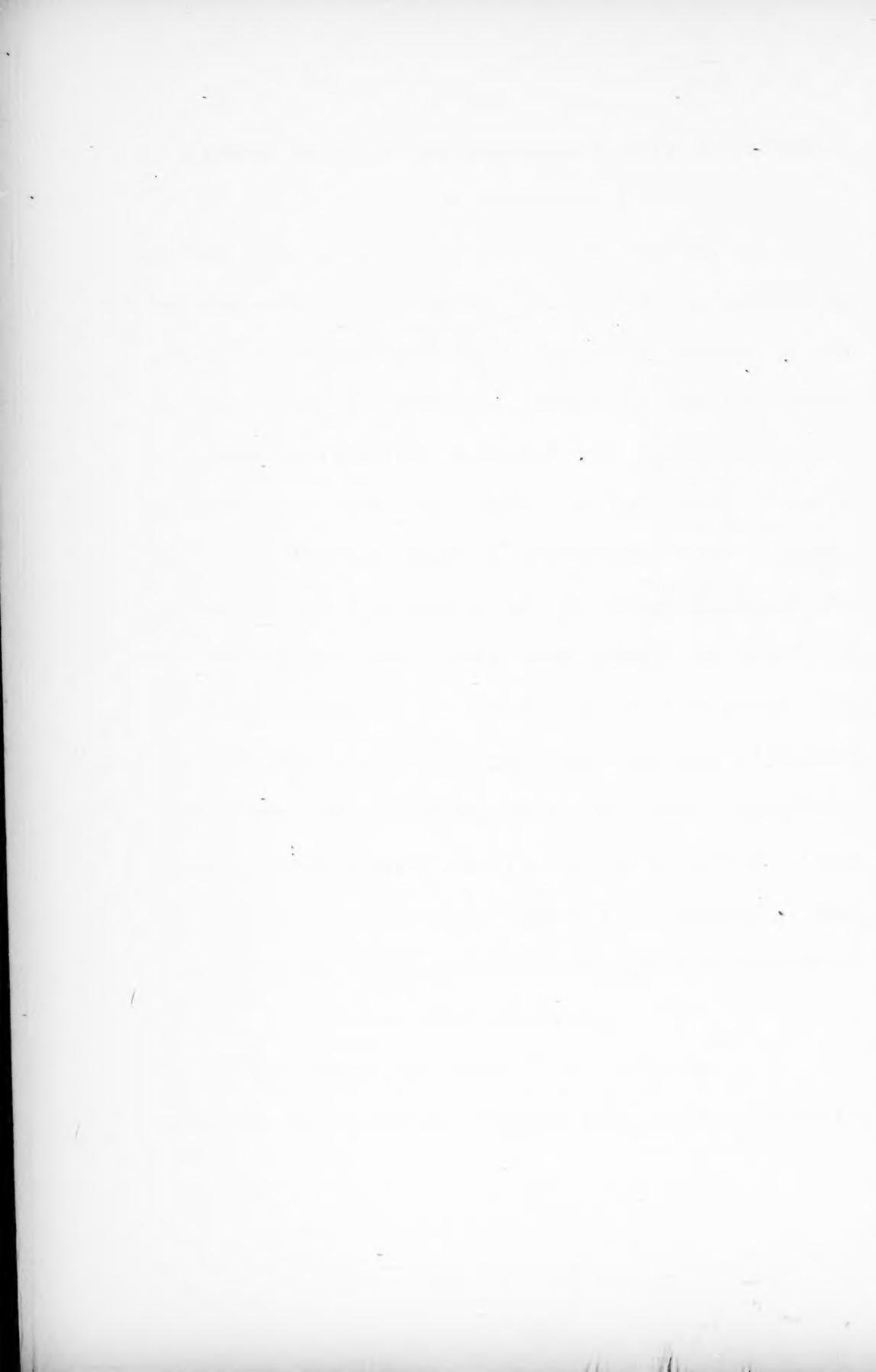
Article V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution Bill of Rights

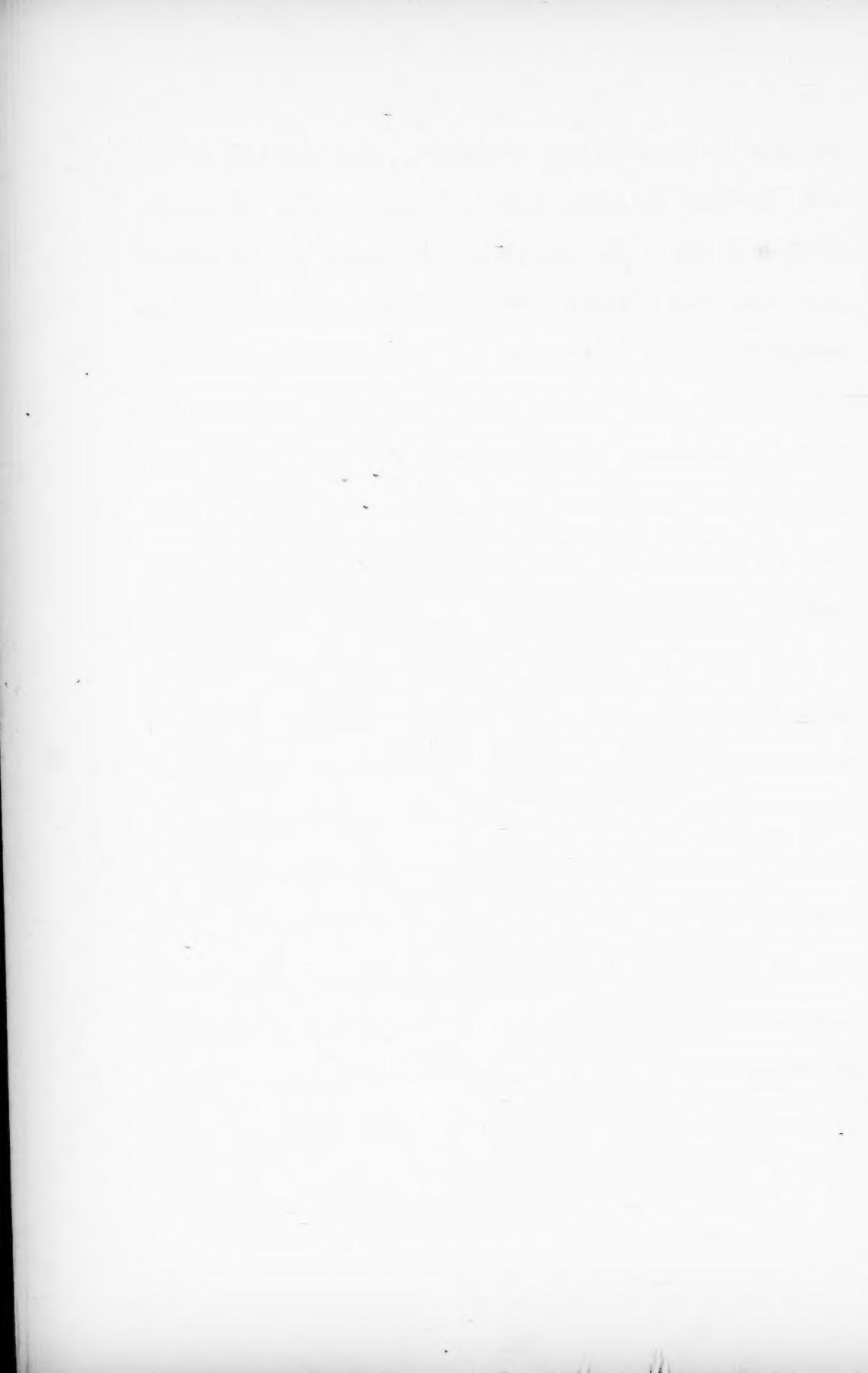
Article XIV

Section 1. All persons born or naturalized in the United States, and subject



to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive



and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State



legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such



debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348.



28 U.S.C. § 1332. Diversity of citizenship;
amount in controversy; costs

-(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000.00, exclusive of interest and costs, and is between ---

- (1) citizens of different States;
- (2) citizens of a State, and foreign states or citizens or subjects thereof; and
- (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of



\$10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: Provided further, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and



of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico, June 25, 1948, c. 646, 62 Stat. 930; July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub.L. 85-554, § 2, 72 Stat. 415; Aug. 14, 1964, Pub.L. 88-439, § 1, 78 Stat. 445.

28 U.S.C. § 1343. Civil rights and elective franchise.

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person.

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done

in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

June 25, 1948, c. 646, 62 Stat. 932; Sept. 3,

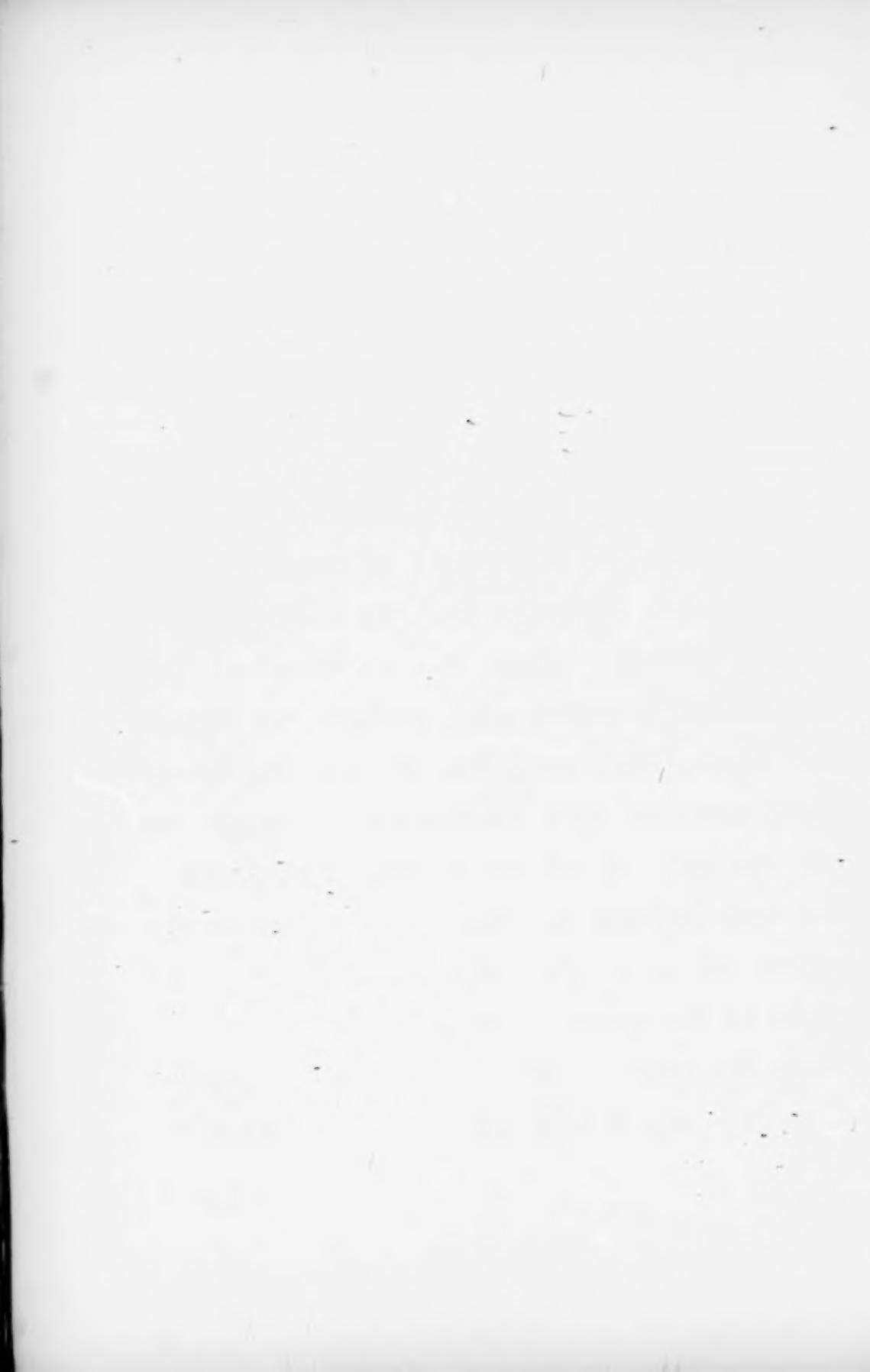


1954, c. 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, Pub.L. 85-315, Part III, § 121, 71 Stat. 637.

28 U.S.C. § 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 111, 63 Stat. 105; Aug. 28,



1954, c. 1033, 68 Stat. 890; July 7, 1958,
Pub.L. 85-508, § 12(p), 72 Stat. 349; Oct. 4,
1976, Pub.L. 94-455, Title XIII, §
1306(b)(8), 90 Stat. 1719; Nov. 6, 1978,
Pub.L. 95-598, Title II, § 249. 92 Stat.
2672.)

United States Constitution Title 15 Ch. 2

**§ 45. Unfair methods of competition
unlawful; prevention by Commission -
Declaration of unlawfulness; power to
prohibit unfair practices**

(a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

(2) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated



prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or

hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.



(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except



as provided in section 406(b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

**Proceeding by Commission;
modifying and setting aside orders**

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said

complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41 to 46 and 47 to 58 of this title, it shall make a report in writing in which it

shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition

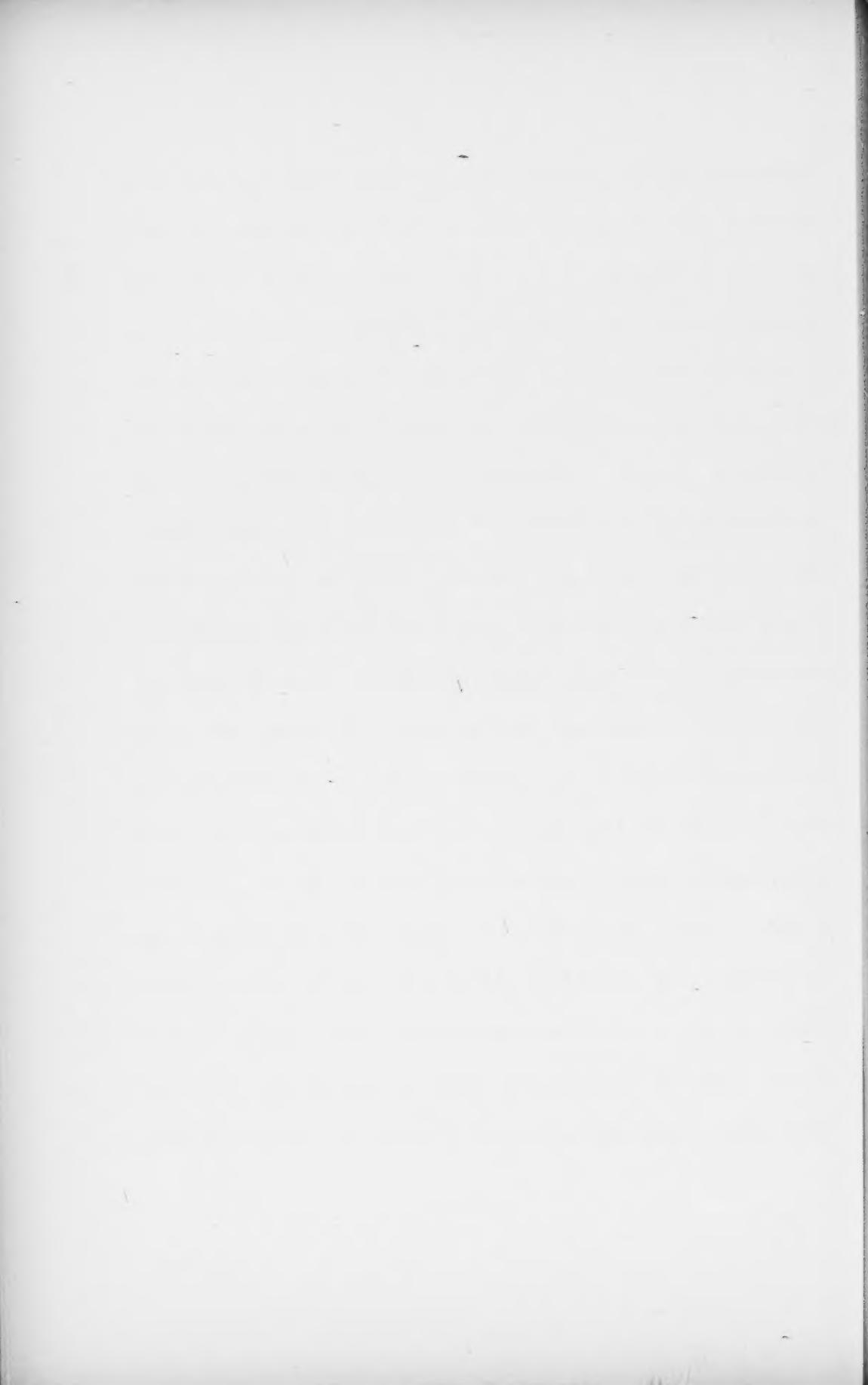
has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: Provided however, That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

Review of order; rehearing

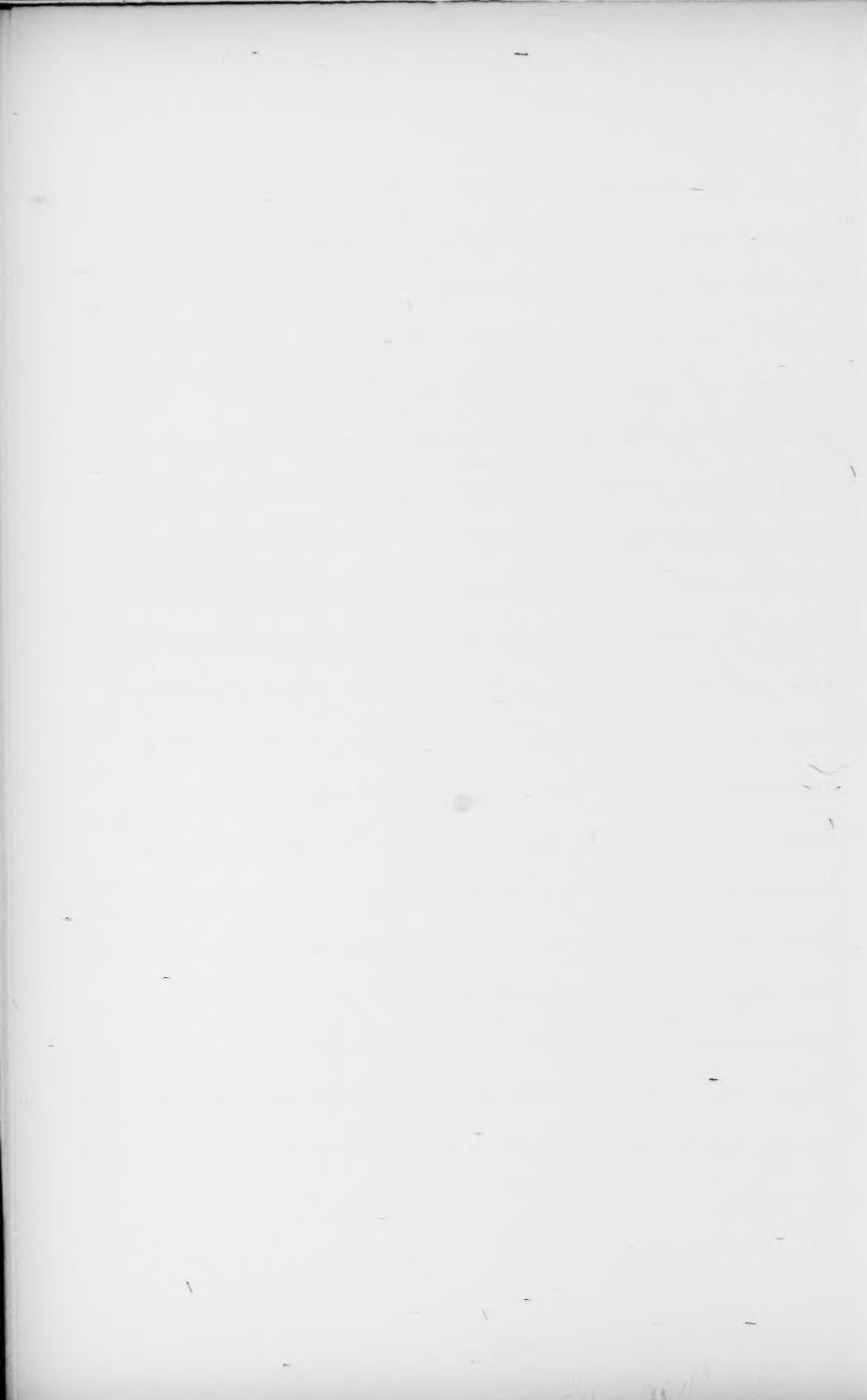
(c) Any person, partnership, or corporation required by an order of the



Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently



with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce



additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same



shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28.

Jurisdiction of court

(d) Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

Precedence of proceedings; exemption

from liability

(e) Such proceedings in the court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the Commission or judgment of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.



**Service of complaints, orders and
other Processes; return**

(f) Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by mailing a copy thereof by registered mail or by certified mail addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other



process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered mail or by certified mail as aforesaid shall be proof of the service of the same.

Finality of order

(g) An order of the Commission to cease and desist shall become final --

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been



affirmed, or the petition for review dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the court of appeals; or

(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.

Same; order modified or set aside by

Supreme Court

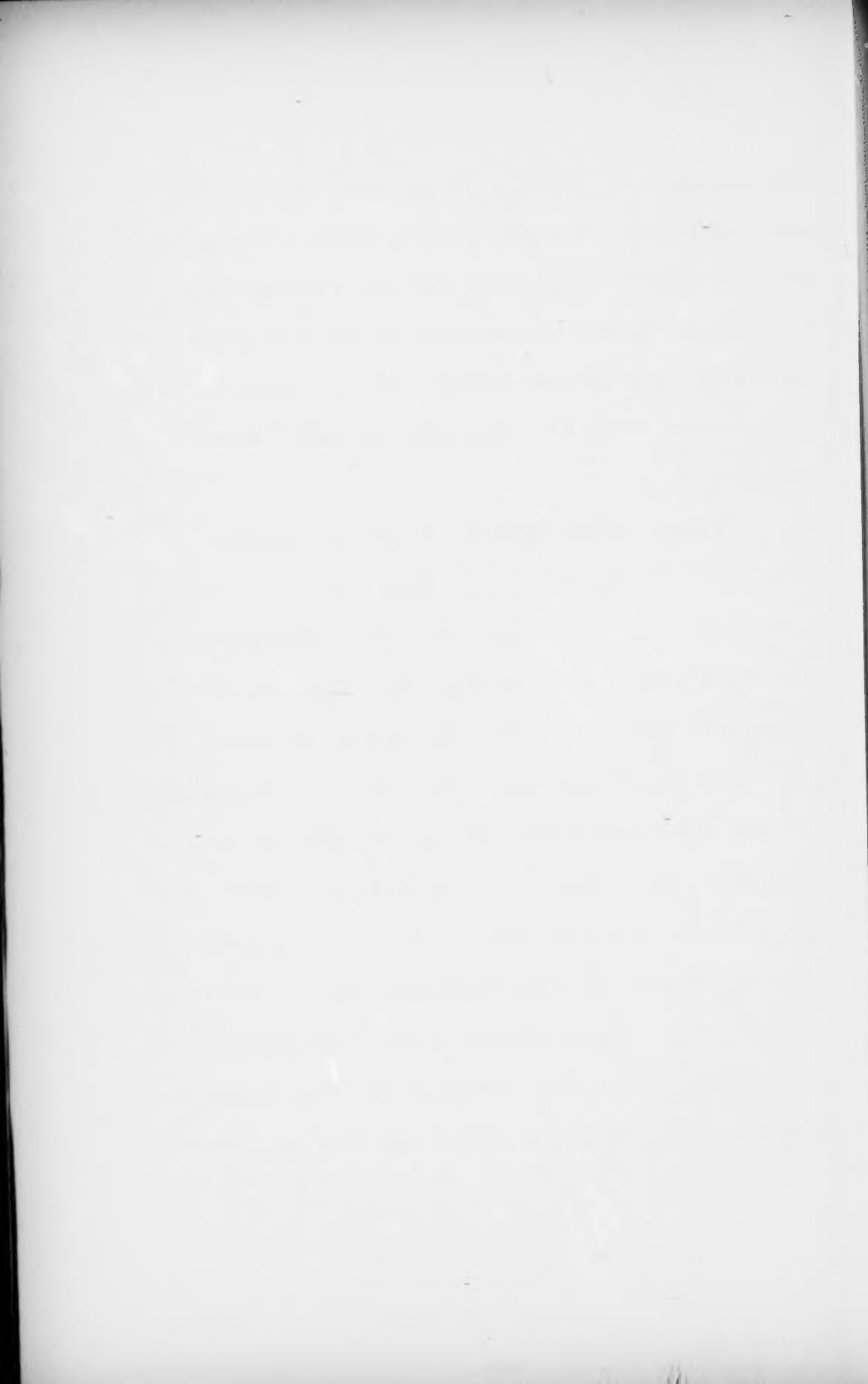
(h) If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the



expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

Same; order modified or set aside
by Court of Appeals

(1) If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration



of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

Same; rehearing upon order or remand

(j) If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly file, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same



manner as though no prior order of the Commission had been rendered.

Definition of mandate

(k) As used in this section the term "mandate", in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

Penalty for violation of order

(1) Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than \$5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of such an order shall be a separate offense, except that in



the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense.

Sept. 26, 1914, c. 311, § 5, 38 Stat. 719;
Feb. 13, 1925, c. 229, § 2, 43 Stat. 939;
Mar. 21, 1938, c. 49, § 3, 52 Stat. 111; June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Mar. 16, 1950, c. 61 § 4(c), 64 Stat. 21; July 14, 1952, c. 745, § 2, 66 Stat. 632; Aug. 23. 1958, Pub.L. 85-726, Title XIV, § 1411, 72 Stat. 809; Aug. 28, 1958, Pub.L. 85-791, § 3, 72 Stat. 942; Sept. 2, 1958, Pub.L. 85-909, § 3, 72 Stat. 1950; June 11, 1960, Pub.L. 86-507, § 1(13), 74 Stat. 200.

**United States Constitution Civil
Rights 42 § 1983. Civil action for
deprivation of rights**



Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.



PART 453 - FUNERAL INDUSTRY PRACTICES

Sec.

453.1 Definitions.

453.2 Price disclosures.

453.3 Misrepresentations.

As discussed previously, the purchase of a funeral is infrequent. Consequently, many consumers will not have exposure to price lists or other provisions of the rule for many years. Thus, the stimulus for price competition, at least initially, is likely to come from sellers rather than buyers. The extent to which new entrants begin to compete on the basis of price, or which existing sellers begin to compete or advertise prices, is likely to determine how quickly competition begins to affect the marketplace. Considering the industry's tradition opposition to price advertising, and other constraints on price competition and barriers



to entry, it is difficult to predict how quickly such competition will emerge.

Sec.

453.4 Required purchase of funeral goods or funeral services.

453.5 Services provided without prior approval.

453.6 Retention of documents.

453.7 Comprehension of disclosures.

453.8 Declaration of intent.

453.9 State exemptions.

453.10 Mandatory review.

Authority: Sec. 6(g) 38 Stat. 721 (15 U.S.C. 46(g); 80 Stat. 383, as amended, 81 Stat. 54 (5 U.S.C. 552)).

§ 453.1 Definitions.

(a) Accounting year. "Accounting year" refers to the particular calendar year or



other one year period used by a funeral provider in keeping financial records for tax or accounting purposes.

(b) Alternative container. An "alternative container" is a non-metal receptacle or enclosure, without ornamentation or a fixed interior lining, which is designed for the encasement of human remains and which is made of cardboard, press-wood, composition materials (with or without an outside covering) or pouches of canvas or other materials.

(c) Cash advance item. A "cash advance item" is any item of service or merchandise described to a purchaser as a "cash advance" "accommodation," "cash disbursement," or similar term. A cash advance item is also any item obtained from a third party and paid for by the funeral provider on the purchaser's behalf. Cash advance items may



include, but are not limited to, the following items: Cemetery or crematory services; pallbearers; public transportation; clergy honoraria; flowers; musicians or singers; nurses; obituary notices; gratuities and death certificates.

(d) Casket. A "casket" is a rigid container which is designed for the encasement of human remains and which is usually constructed of wood, metal, or like material, and ornamented and lined with fabric.

(e) Commission. "Commission" refers to the Federal Trade Commission.

(f) Cremation. "Cremation" is a heating process which incinerates human remains.

(g) Crematory. A "crematory" is any person, partnership or corporation that performs cremation and sells funeral goods.



(h) Direct cremation. A "direct cremation" is a disposition of human remains by cremation, without formal viewing, visitation, or ceremony with the body present.

(i) Funeral goods. "Funeral goods" are the goods which are sold or offered for sale directly to the public for use in connection with funeral services.

(j) Funeral provider. A "funeral provider" is any person, partnership or corporation that sells or offers to sell funeral goods and funeral services to the public.

(k) Funeral services. "Funeral services" are any services which may be used to care for and prepare deceased human bodies for burial, cremation or other final disposition; and arrange, supervise or conduct the funeral ceremony or the final disposition of deceased human bodies.



(l) Immediate burial. An "immediate burial" is a disposition of human remains by burial, without formal viewing, visitation, or ceremony with the body present, except for a graveside service.

(m) Outer burial container. An "outer burial container" is any container which is designed for placement in the grave around the casket including, but not limited to, containers commonly known as burial vaults, grave boxes, and grave liners.

(n) Person. A "person" is any individual, partnership, corporation, association, government or governmental subdivision or agency, or other entity.

(o) Services of funeral director and staff. The "services of funeral director and staff" are the services, not included in prices of other categories in § 453.2(b)(4) which may be furnished by a funeral provider



in arranging and supervising a funeral, such as conducting the arrangements conference, planning the funeral, obtaining necessary permits and placing obituary notices.

(p) Unfinished wood box. An "unfinished wood box" is an unornamented casket made of wood which does not have a fixed interior lining.

§ 453.2 Price disclosures.

(a) Unfair or deceptive acts or practices. In selling or offering to sell funeral goods or funeral services to the public, is it an unfair or deceptive act or practice for a funeral provider to fail to furnish price information disclosing the cost to the purchaser for each of the specific funeral goods and funeral services used in connection with the disposition of deceased human bodies, including at least the price of embalming, transportation of remains, use of

facilities, caskets, outer burial containers, immediate burials, or direct cremations, to persons inquiring about the purchase of funerals. Any funeral provider who complies with the preventive requirements in paragraph (b) of this section is not engaged in the unfair or deceptive acts or practices defined here.

(b) Preventive requirements. To prevent these unfair or deceptive acts or practices, as well as the unfair or deceptive acts or practices defined in § 453.4(b)(1), funeral providers must:

(1) Telephone price disclosures. (i) Tell persons who call the funeral provider's place of business and ask about the terms, conditions, or prices at which funeral goods or funeral services are offered, that price information is available over the telephone.



(ii) Tell persons who ask by telephone about the funeral provider's offerings or prices any accurate information from the price lists in paragraph (b)(2) through (4) of this section which reasonably answers the question and any other information which reasonably answers the question and which is readily available.

(2) Casket price list. (i) Give a printed or typewritten price list to people who inquire in person about the offerings or prices of caskets or alternative containers. The funeral provider must offer the list upon beginning discussion of, but in any event before showing caskets. The list must contain at least the retail prices of all caskets and alternative containers offered which do not require special ordering, enough information to identify each, and the effective date for the price list. In lieu



of a written list, other formats, such as notebooks, brochures, or charts may be used if they contain the same information as would the printed or typewritten list, and display it in a clear and conspicuous manner. Provided however, that funeral providers do not have to make a casket price list available if the funeral providers place on the general price list, specified in paragraph (b)(4) of this section, the information which is required by this paragraph (b)(2)(i) of this section.

(ii) Place on the list, whether a printed or typewritten list or other format is used, the name of the funeral provider's place of business and a caption describing the list as a "casket price list."

(3) Outer burial container price list.

(i) Give a printed or typewritten price list to persons who inquire in person about outer



burial container offerings or prices. The funeral provider must offer the list upon beginning discussion of, but in any event before showing the containers. The list must contain at least the retail prices of all outer burial containers offered which do not require special ordering, enough information to identify each container, and the effective date for the prices listed. In lieu of a written list, the funeral provider may use other formats, such as notebooks, brochures, or charts, if they contain the same information as the printed or typewritten list, and display it in a clear and conspicuous manner. Provided however, that funeral providers do not have to make an outer burial container price list available if the funeral providers place on the general price list, specified in paragraph (b)(4) of this section, the information which is

required by this paragraph (b)(3)(i) of this section.

(ii) Place on the list, whether a printed or typewritten list or other format is used, the name of the funeral provider's place of business and a caption describing the list as an "outer burial container price list."

(4) General price list. (i) Give a printed or typewritten price list for retention to persons who inquire in person about funeral arrangements or the prices of funeral goods or funeral services. When people inquire in person about funeral arrangements or the prices of funeral goods or funeral services, the funeral provider must offer them the list upon beginning discussion either of funeral arrangements or of the selection of any funeral goods or



funeral services. This list must contain at least the following information:

- (A) The name, address, and telephone number of the funeral provider's place of business;
- (B) A caption describing the list as a "general price list";
- (C) The effective date for the price list; and
- (D) In immediate conjunction with the price disclosures required by paragraph (b)(4)(ii) of this section, the statement: "This list does not include prices for certain items that you may ask us to buy for you, such as cemetery or crematory services, flowers, newspaper notices. The prices for those items will be shown on your bill or the statement describing the funeral goods and services you selected."



(ii) Include on the price list, in any order, the retail prices (expressed either as the flat fee, or as the price per hour, mile or other unit of computation) and the other information specified below for at least each of the following items, if offered for sale:

(A) Forwarding of remains to another funeral home, together with a list of the services provided for any quoted price;

(B) Receiving remains from another funeral home, together with a list of the services provided for any quoted price;

(C) The price range for the direct cremations offered by the funeral provider, together with: (1) A separate price for a direct cremation where the purchaser provides the container; (2) separate prices for each direct cremation offered including an unfinished wood box or alternative container;

and (3) a description of the services and container (where applicable), included in each price;

(D) The price range for the immediate burials offered by the funeral provider, together with: (1) A separate price for an immediate burial where the purchaser provides the casket; (2) separate prices for each immediate burial offered including a casket or alternative container; and (3) a description of the services and container (where applicable) included in that price;

(E) Transfer of remains to funeral home;

(F) Embalming;

(G) Other preparation of the body;

(H) Use of facilities for viewing;

(I) Use of facilities for funeral ceremony;



(J) Other use of facilities, together with a list of facilities provided for any quoted price;

(K) Hearse;

(L) Limousine;

(M) Other automotive equipment, together with a description of the automotive equipment provided for any quoted price; and

(N) Acknowledgment cards.

(iii) Include on the price list, in any order, the following information:

(A) Either of the following:

(1) The price range for the caskets offered by the funeral provider, together with the statement: "A complete price list will be provided at the funeral home"; or

(2) The prices of individual caskets, disclosed in the manner specified by paragraph (b)(2)(i) of this section; and



(B) Either of the following:

(1) The price range for the outer burial containers offered by the funeral provider, together with the statement: "A complete price list will be provided at the funeral home"; or

(2) The prices of individual outer burial containers, disclosed in the manner specified by paragraph (b)(3)(i) of this section; and

(C) Either of the following:

(1) The price for the services of funeral director and staff, together with a list of principal services provided for any quoted price and, if the charge cannot be declined by the purchaser, the statement: "This fee for our services will be added to the total cost of the funeral arrangements you select. (This fee is already included in our charges for direct cremations, immediate



burials, and forwarding or receiving remains."); or

(2) The following statement: "Please note that a fee for the use of our services is included in the price of our caskets. Our services include (specify)." The statement must be placed on the general price list together with casket price range, required by paragraph (b)(4)(iii)(A)(1) of this section, or together with the prices of individual caskets, required by (b)(4)(iii)(A)(2).

(5) Statement of funeral goods and services selected. (i) Give an itemized written statement for retention to each person who arranges a funeral or other disposition of human remains, at the conclusion of the discussion of arrangements. The statement must list a least the following information:



(A) The funeral goods and funeral services selected by that person and the prices to be paid for each of them;

(B) Specifically itemized cash advance items. (These prices must be given to the extent then known or reasonably ascertainable. If the prices are not known or reasonably ascertainable, a good faith estimate shall be given and a written statement of the actual charges shall be provided before the final bill is paid); and

(C) The total cost of the goods and services selected.

(ii) The information required by this paragraph (b)(5) of this section may be included on any contract, statement, or other document which the funeral provider would otherwise provide at the conclusion of discussion of arrangements.



(6) Other pricing methods. Funeral providers may give persons any other price information, in any other format, in addition to that required by paragraph (b)(2), (3), and (4) of this section so long as the statement required by paragraph (b)(5) of this section is given when required by the rule.

§ 453.3 Misrepresentations.

(a) Embalming Provisions. - (1) Deceptive acts or practices. In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(i) Represent that state or local law requires that a deceased person be embalmed when such is not the case;

(ii) Fail to disclose that embalming is not required by law except in certain special cases.



(2) Preventive requirements. To prevent these deceptive acts or practices, as well as the unfair or deceptive acts or practices defined in §§ 453.4(b)(1) and 453.5(2), funeral providers must;

(i) Not represent that a deceased person is required to be embalmed for direct cremation, immediate burial, a funeral using a sealed casket, or if refrigeration is available and the funeral is without viewing or visitation and with a closed casket when state or local law does not require embalming; and

(ii) Place the following disclosure on the general price list, required by § 453.2(b)(4), in immediate conjunction with the price shown for embalming: "Except in certain special cases, embalming is not required by law. Embalming may be necessary, however, if you select certain funeral

arrangements, such as a funeral with viewing. If you do not want embalming, you usually have the right to choose an arrangement which does not require you to pay for it, such as direct cremation or immediate burial."

(b) Casket for cremation provisions.

(1) Deceptive acts or practices. In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(i) Represent that state or local law requires a casket for direct cremations;

(ii) Represent that a casket (other than an unfinished wood box) is required for direct cremations.

(2) Preventive requirements. To prevent these deceptive acts or practices, as well as the unfair or deceptive acts or practices defined in § 453.4(a)(1), funeral providers must place the following disclosure in



immediate conjunction with the price range shown for direct cremations: "If you want to arrange a direct cremation, you can use an unfinished wood box or an alternative container. Alternative containers can be made of materials like heavy cardboard or composition materials (with or without an outside covering), or pouches of canvas." This disclosure only has to be placed on the general price list if the funeral provider arranges direct cremations.

(c) Outer burial container provisions. -

(1) Deceptive acts or practices. In selling or offering to sell funeral goods and funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(i) Represent that state or local laws or regulations, or particular cemeteries, require outer burial containers when such is not the case;



(ii) Fail to disclose to person arranging funerals that state law does not require the purchase of an outer burial container.

(2) Preventive requirement. To prevent these deceptive acts or practices, funeral providers must place the following disclosure on the outer burial container price list, required by § 453.2(b)(3)(ii), or, if the prices of outer burial containers are listed on the general price list, required by § 453.2(b)(4), in immediate conjunction with those prices: "In most areas of the country, no state or local law makes you buy a container to surround the casket in the grave. However, many cemeteries ask that you have such a container so that the grave will not sink in. Either a burial vault or a grave liner will satisfy these requirements."

(d) General provisions on legal and cemetery requirements. - (1) Deceptive acts or practices. In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for funeral providers to represent that federal, state, or local laws, or particular cemeteries or crematories, require the purchase of any funeral goods or funeral services when such is not the case.

(2) Preventive requirements. To prevent these deceptive acts or practices, as well as the deceptive acts or practices identified in § 453.3(a)(1), § 453.3(b)(1), and § 453.3(c)(1), funeral providers must identify and briefly describe in writing on the statement of funeral goods and services selected (required by § 453.2(b)(5) any legal, cemetery, or crematory requirement which the funeral provider represents to

v

persons as compelling the purchase of funeral goods or funeral services for the funeral which that person is arranging.

(e) Provision on preservative and protective value claims. In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for the funeral provider to:

(1) Represent that funeral goods or funeral services will delay the natural decomposition of human remains for a long-term or indefinite time;

(2) Represent that funeral goods have protective features or will protect the body from gravesite substances, when such is not the case.

(f) Cash advance provisions. - (1) Deceptive acts or practices. In selling or offering to sell funeral goods or funeral



services to the public, it is a deceptive act or practice for a funeral provider to:

(i) Represent that the price charged for a cash advance item is the same as the cost to the funeral provider for the item when such is not the case;

(ii) Fail to disclose to persons arranging funerals that the price being charged for a cash advance item is not the same as the cost to the funeral provider for the item when such is the case.

(2) Preventive requirements. To prevent these deceptive acts or practices, funeral providers must place the following sentence in the general price list, at the end of the cash advances disclosure, required by § 453.2(b)(4)(ii)(C): "We charge you for our services in buying these items," if the funeral provider makes a change upon, or receives and retains a rebate, commission or

trade or volume discount upon a cash advance item.

§ 453.4 Required purchase of funeral goods or funeral services.

(a) Casket for cremation provisions. -

(1) **Unfair or deceptive acts or practices.** In selling or offering to sell funeral goods or funeral services to the public, it is an unfair or deceptive act or practice for a funeral provider, or a crematory, to require that a casket other than an unfinished wood box be purchased for direct cremation.

(2) **Preventive requirement.** To prevent this unfair or deceptive act or practice, funeral providers must make and unfinished wood box or alternative container available for direct cremations, if they arrange direct cremations.

(b) Other required purchases of funeral good or funeral services. (1) **Unfair or**

deceptive acts or practices. In selling or offering to sell funeral goods or funeral services, it is an unfair or deceptive act or practice for a funeral provider to condition the furnishing of any funeral good or funeral service to a person arranging a funeral upon the purchase of any other funeral good or funeral service, except as required by law or as otherwise permitted by this part.

(2) Preventive requirements. (i) To prevent this unfair or deceptive act or practice, funeral providers must:

(A) Place the following disclosure in the general price list, immediately above the prices required by § 453.2(b)(4)(ii) and (iii): "The goods and services shown below are those we can provide to our customers. You may choose only the items you desire. If legal or other requirements mean you must buy any items you did not specifically ask for,



we will explain the reason in writing on the statement we provide describing the funeral goods and services you selected."

Provided however, That if the charge for "services of funeral director and staff" cannot be declined by the purchaser, the statement shall include the sentence: "However, any funeral arrangements you select will include a charge for our services" between the second and third sentences of the statement specified above herein: and

(B) Place the following disclosure on the statement of funeral goods and services selected, required by § 453.2(b)(5)(ii): "Charges are only for those items that are used. If we are required by law to use any items, we will explain the reasons in writing below."

(ii) A funeral provider shall not violate this section by failing to comply

with a request for a combination of goods or services which would be impossible, impractical, or excessively burdensome to provide.

§ 453.5 Services provided without prior approval.

(a) Unfair or Deceptive Acts or practices. In selling or offering to sell funeral goods or funeral services to the public, it is an unfair or deceptive act or practice for any provider to embalm a deceased human body for a fee unless:

(1) State or local law or regulation requires embalming in the particular circumstances regardless of any funeral choice which the family might make; or

(2) Prior approval for embalming (expressly so described) has been obtained from a family member or other authorized person; or



(3) The funeral provider is unable to contact a family member or other authorized person after exercising due diligence, has no reason to believe the family does not want embalming performed, and obtains subsequent approval for embalming already performed (expressly so described). In seeking approval, the funeral provider must disclose that a fee will be charged if the family selects a funeral which required embalming, such as a funeral with viewing, and that no fee will be charged if the family selects a service which does not require embalming, such as direct cremation or immediate burial.

(b) Preventive requirement. To prevent these unfair or deceptive acts or practices, funeral providers must include on the contract, final bill, or other written evidence of the agreement or obligation given to the customer, the statement: "If you



selected a funeral which requires embalming, such as a funeral with viewing you may have to pay for embalming. You do not have to pay for embalming you did not approve if you selected arrangement such as a direct cremation or immediate burial. If we charged for embalming, we will explain why below."

§ 453.6 Retention of documents.

To prevent the unfair or deceptive acts or practices specified in § 453.2 and § 453.3 of this rule, funeral providers must retain and make available for inspection by Commission officials true and accurate copies of the price lists specified in § 453.2(b) (2) through (4), as applicable, for at least one year after the date of their last distribution to customers, and a copy of each statement of funeral goods and services selected, as required by § 453.2(b) (5) for



at least one year from the date on which the statement was signed.

§ 453.7 Comprehension of disclosures.

To prevent the unfair or deceptive acts or practices specified in § 453.2 through § 453.5, funeral providers must make all disclosures required by those sections in a clear and conspicuous manner.

§ 453.8 Declaration of Intent.

(a) Except as otherwise provided in § 453.2(a), it is a violation of this rule to engage in any unfair or deceptive acts or practices specified in this rule, or to fail to comply with any of the preventive requirements specific in this rule;

(b) The provisions of this rule are sparcate and severable from one another. If any provision is determined to be invalid, it is the Commission's intention that the



remaining provisions shall continue in effect.

(c) This rule shall not apply to the business of insurance or to acts in the conduct thereof.

§ 453.9 State exemptions.

If, upon application to the Commission by an appropriate state agency, the Commission determines that:

(a) There is a state requirement in effect which applies to any transaction to which this rule applies; and

(b) That state requirement affords an overall level of protection to consumers which is as great as, or greater than, the protection afforded by this rule; then the commission's rule will not be in effect in that state to the extent specified by the Commission in its determination, for as long



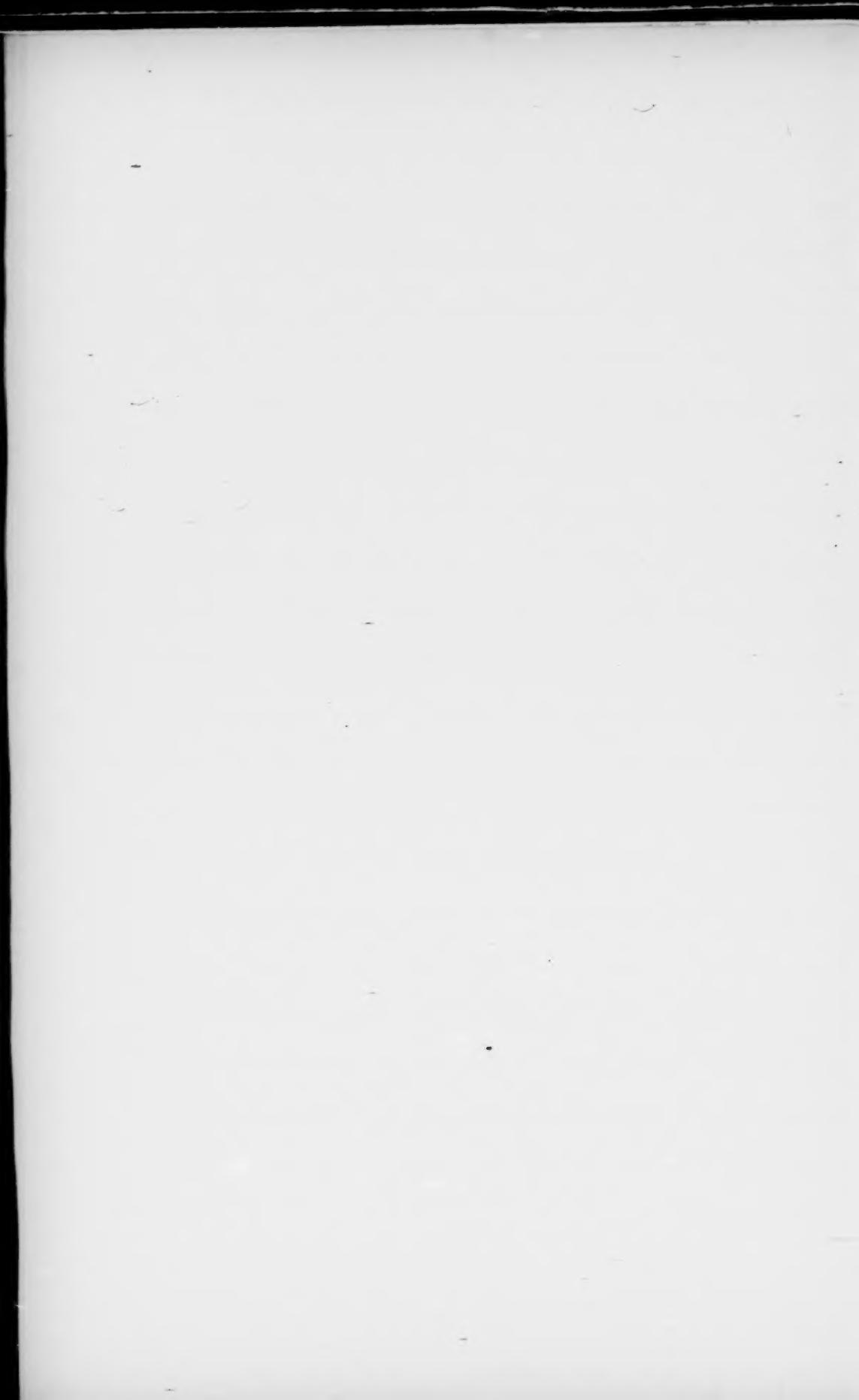
as the State administers and enforces effectively the state requirement.

§ 453.10 Mandatory review.

No later than four years after the effective date of this rule, the Commission shall initiate a rulemaking amendment proceeding pursuant to section 18(d)(2)(B) to determine whether the rule should be amended or terminated. The Commission's final decision on the recommendations of this proceeding shall be made no later than eighteen months after the initiation of the proceeding.

West Virginia Code § 46A-2-132. Home solicitation; buyer's right to cancel; notice.

In addition to any other right to revoke an offer, a buyer shall have the right to cancel a home solicitation sale until midnight of the third business day after the



day on which he has signed an agreement or offer to purchase. Cancellation shall become effective when the buyer gives written notice of his intention to cancel to the seller at the address stated in the agreement or offer to purchase. Notice of such cancellation, if given by mail, is given when it is deposited in a mailbox properly addressed and postage prepaid. Such notice of cancellation given by the buyer need not take any particular form and shall be sufficient if it indicates by any form of written expression the intention of the buyer not to be bound by the home solicitation sale. Notwithstanding any above-mentioned provision, a buyer may not cancel a home solicitation sale where he has requested and the seller has provided goods or services without delay because of a bona fide emergency and either the seller has in good



faith made a substantial beginning of performance of the agreement before the buyer has given notice of cancellation, or in the case of goods, such goods cannot be returned to the seller in substantially as good condition as when they were received by the buyer. (1974, c. 12.)

West Virginia Code § 47-14-1.

Declaration of policy; legislative intent.

It is contrary to public policy for any person to receive, hold, control or manage funds or proceeds received from the sale of, or from a contract to sell, funeral services, funeral goods, burial goods or any one or combination of them, where payments for same are made either outright or on an installment basis, prior to the death of the person or persons so purchasing them, or for whom they are purchased, unless that person holds, controls or manages those funds subject to



the limitations regulations prescribed by this article.

It is the legislative intent that the provisions of this article shall be construed as a limitation upon the manner in which a person is permitted to accept funds in prepayment of funeral services to be performed in the future, or funeral or burial goods to be used in connection with the funeral or final disposition of human remains, so that at all times members of the public may have an opportunity to arrange and pay for funerals for themselves and their families in advance of need while at the same time providing all possible safeguards whereunder such prepaid funds cannot be dissipated, whether intentionally or not, in order that such funds are available for the payment of funeral services so arranged. Further, it is the legislative intent that no



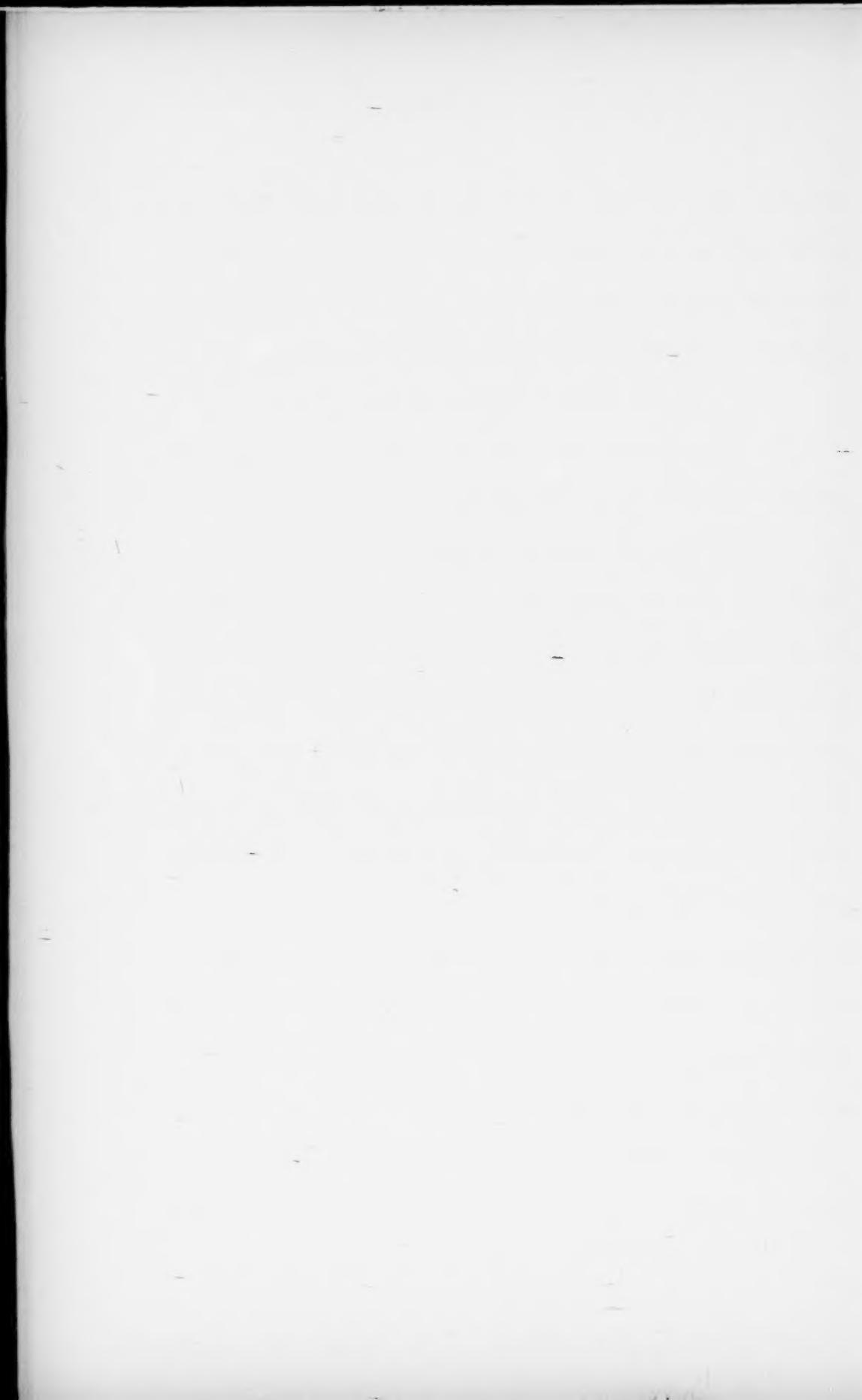
person may offer, sell or negotiate for the sale of a preneed funeral service contract through anyone who is not licensed under this article. (1965, c. 145; 1983, c. 161.)

§ 47-14-2. Definitions.

As used in this article, unless the context otherwise requires:

(1) "Burial goods" means all merchandise supplied in regard to burial, or entombment in a mausoleum or inurnment in a columbarium, but does not include those services actually performed by a cemetery acting only as such, or the sale by any person of cemetery lots, land or interest therein, services incidental thereto, or the sale by any person of markers, memorials, monuments, equipment, crypts, urns, burial vaults or vaults constructed or to be constructed in a mausoleum or columbarium.

(2) "Contract beneficiary" means any person specified or implied in a preneed



funeral contract, upon whose death funeral services, funeral goods or burial goods shall be performed, provided or delivered.

(3) "Contract buyer" means any person, whether or not a contract beneficiary, who purchases goods or services pursuant to a preneed funeral contract but shall not include any person other than a natural person.

(4) "Contract seller" or "seller" means a person, his agent or his employee, who sells, makes available or provides preneed funeral contracts.

(5) "Department" means the state department of labor.

(6) "Funds" means moneys or other consideration received pursuant to the sale of a preneed funeral contract, including interest accrued or earned thereon.



(7) "Funeral goods" means those items of merchandise sold or offered for sale directly to the public by any person which will be used in connection with a funeral or alternative for final disposition of human remains, but does not include those services actually performed by a cemetery acting only as such, or the sale by the cemetery of cemetery lots, land or interest therein, services incidental thereto, or the sale by any person of markers, memorials, monuments, equipment, crypts, urns, burial vaults or vaults constructed or to be constructed in a mausoleum or columbarium.

(8) "Funeral services" means those services usually performed by a funeral service licensee, including, but not limited to, care and preparation of human remains and coordinating rites and ceremonies in connection with the disposition of human



remains carried out at the request of any individual responsible for funeral and disposition arrangements.

(9) "Person" means a natural person, partnership, firm, association or corporation, including any agent or employee thereof residing in or doing business in the State who is engaged in the selling of, making available of or providing of "preneed funeral contracts," defined herein, or is the recipient of funds paid for such purpose.

(10) "Person who makes a preneed funeral contract available" means a person who, while not directly selling the contents of a preneed funeral contract to the public through his efforts, makes such contracts available to the public but shall not include manufacturers of funeral goods or burial goods.



(11) "Personal residence" means any residential building in which one temporarily or permanently maintains his abode including, but not limited to, hotels, motels, apartments, nursing homes, convalescent homes, homes for the aged and public and private institutions.

(12) "Preneed funeral contract" means any contract, agreement, mutual understanding, series or combination of contracts, agreements and mutual understandings, other than a contract of insurance, under which, for a specified consideration paid in advance of death in a lump sum or by installments, a person promises to furnish or make available or provide funeral services, funeral goods or burial goods for use at a time determinable by the death of the "contract beneficiary" who is either named or implied.



(13) "Provider" means a person who, though not a party to a preneed funeral contract does, through his efforts, make the services or goods referred to in such a contract available to the public pursuant to such a contract.

(14) "Trustee" means any natural person, partnership or corporation, including any bank, trust company, savings and loan association or credit union, which receives money pursuant to any agreement or contract made pursuant to the provisions of this article. (1983, c. 161.)

§ 47-14-3. Certificate of authority required; fees to go to department of labor; special account established; duties of certificate holder.

(a) No person may receive, hold, control or manage any funds or other thing of value tendered as payment on any preneed funeral contract unless such person has



obtained a certificate of authority or renewal thereof from the department: Provided, That no bank, trust company, savings and loan association or other financial institution regulated by this State or insured by an agency of the United States federal government is required to obtain a certificate of authority.

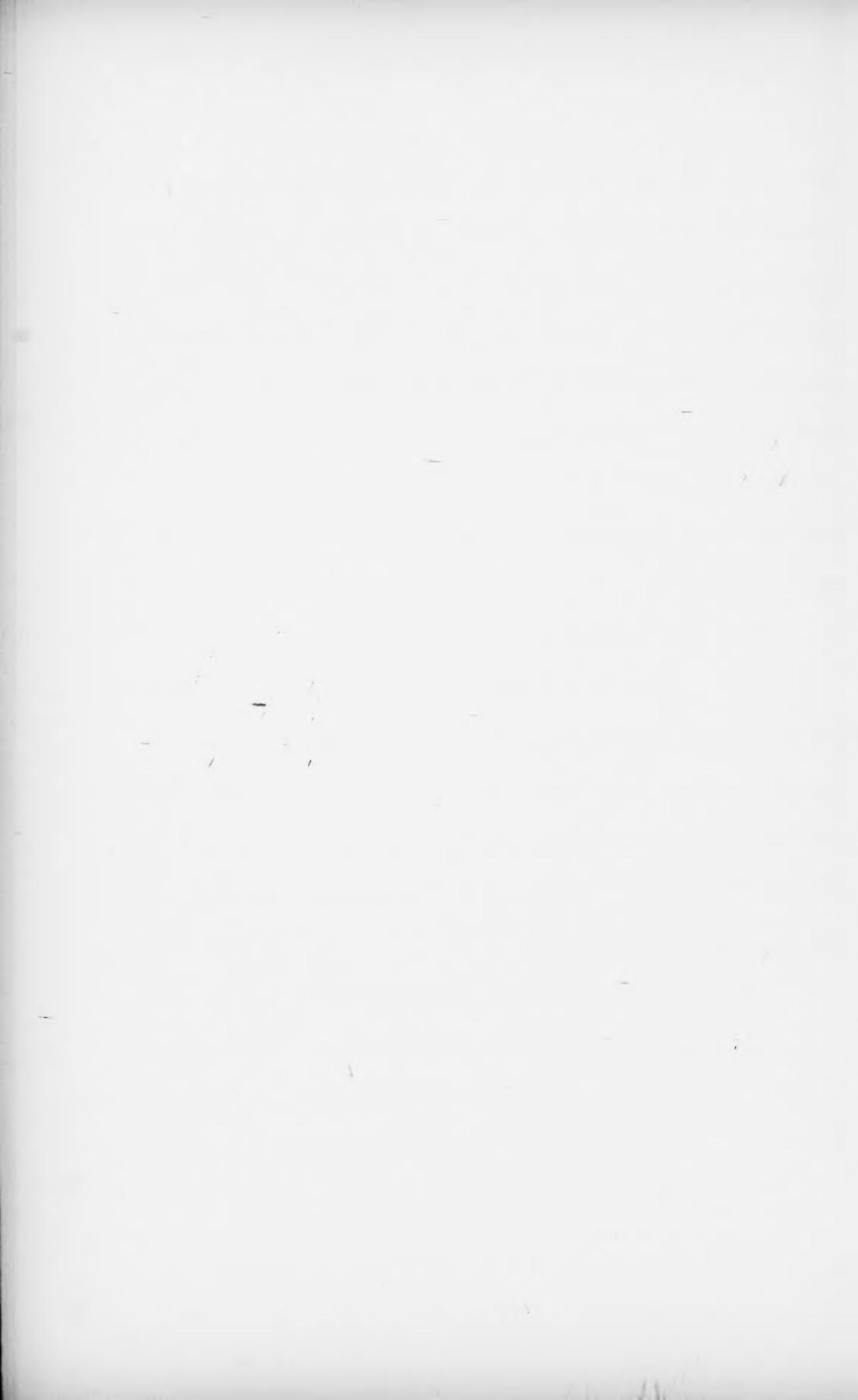
(b) No person may sell, make available or be a provider of a preneed funeral contract unless such person has obtained a certificate of authority or renewal thereof from the department.

(c) Any person desiring to obtain a certificate of authority shall file with the department, upon forms provided by the department, a completed application, together with a one hundred dollar application fee for his original certificate of authority. The fee shall be payable to a special revenue



account to be known as the "Preneed Burial Contract Regulation Fund" for the purpose of administering the provisions of this article. The original application or a renewal application shall contain at least the following information:

- (1) The name and address of each person owning ten percent or more interest in the applicant;
- (2) The experience of the applicant;
- (3) Such other information as the department may require to determine to its satisfaction that the applicant possesses the ability, experience, financial stability and integrity to deal in preneed funeral contracts; and
- (4) The types of preneed funeral contracts proposed to be written or otherwise dealt in and copies of any writings used pursuant thereto; and if a person is a party



to or bound any any such contract, an itemization of all outstanding preneed funeral contracts, the dates upon which such contracts were entered into, the names of all parties involved in such contracts or having any right thereunder, the amount paid toward each contract and, if payments are not completed, the amounts owing on each contract and the present depository or holder of all such funds.

(d) Each certificate of authority holder shall renew its certificate of authority according to the schedule established by this article. The fee for renewal shall be two hundred dollars, payable to the "Preneed Burial Contract Regulation Fund" established by this section.

(e) Each certificate of authority holder shall file with the department an annual



report with its request for renewal which shall contain the following:

(1) An identification of all outstanding preneed funeral contracts, the dates upon which the contracts were entered, the names of all parties involved in such contracts or having any right thereunder, including, but not limited to, the beneficiary, the amount paid on each contract and, if payments are not completed, the amounts owing and the present balance of funds applicable to each such contract.

(2) The name of the contract seller and the name of the provider of services and goods and a statement that the provider has sufficient funds available to perform all of its obligations under its contracts.

(3) A statement that the contract seller and the person receiving funds paid thereunder have complied with the trust



requirements of this article and of the present depository or holder of such funds and a statement of all the amounts thereof itemized as to each such contract.

(4) Any changes or amendments in any contracts or obligations of the seller and provider that occurred since the date of the last report.

(5) Such other information as may be considered necessary by the department in order to meet its responsibilities under this article.

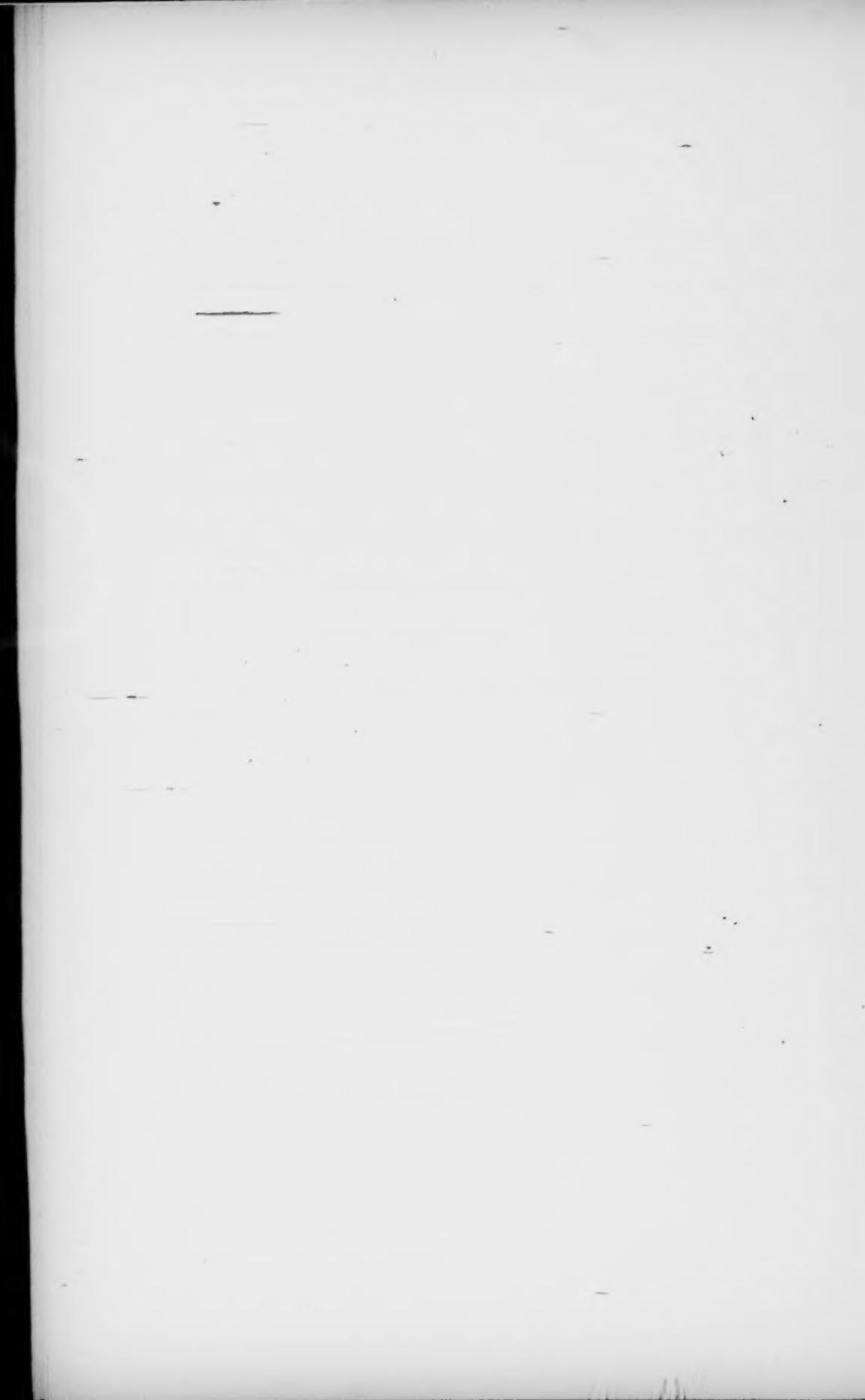
This annual report shall be required of any person who sells, provides or makes preneed funeral contracts available or receives moneys or other consideration therefor from the public.

(f) An original certificate of authority expires on the thirty-first day of December following its issuance.



(g) Every application, request for renewal and statement filed with either of the foregoing shall be sworn by the applicant or certificate holder. If the certificate holder is a partnership, it shall be sworn by each member thereof. If the certificate holder is a corporation, it shall be sworn by the president and secretary thereof.

(h) Upon the department's being satisfied that the statement and matters which may accompany it meet the requirements of this article and of its rules and regulations and, if by investigation by the department of the principals, including directors, officers, stockholders, employees and agents of such person, nothing is found to warrant denial of the certificate, the department shall issue to such person the certificate of authority or renewal thereof.



(i)(1) The certificate holder shall keep accurate accounts, books and records in this State of all transactions, copies of all contracts, dates and amounts of payments made and accepted thereon, the name and address of each contract buyer, the name of the beneficiary as to each contract, the name of the trustee holding trust funds received under each contract and such other records as the department may require to enable it to determine whether such certificate holder is complying with the provisions of this article. Such records must be kept until twelve months after termination of the applicable preneed contract.

(2) The certificate holder shall make all books and records pertaining to preneed funeral contracts available to the department for examination. The department may not more frequently than once in any calendar year,



unless pursuant to an order of court for good cause shown, during ordinary business hours, cause to be examined the books, records and accounts of the certificate holder with respect to funds received by said certificate holder and for that purpose may require the attendance of and examine, under oath, all persons whose testimony he may require.

(3) The certificate holder shall pay for the costs of any examination which is not the first one in that calendar year, including the salary and traveling expenses paid to the person making the examination during the time spent in making the examination and in traveling to and returning from the point where the records are kept and all other expenses necessarily incurred in the examination. The department shall assess and collect a fee for each such examination, based on the certificate holder's total



outstanding preneed funeral service contracts and the cost of such examination, but the cost to the person being audited shall not be more than a total cost of five hundred dollars for each such examination. This fee shall be payable to the "Preneed Burial Contract Regulation Fund" established in this section. (1983, c. 161.)

**§ 47-14-4. Agents and employees;
licenses required; fee to go to
department of labor.**

No agent or employee of a contract seller may sell preneed funeral contracts in this State without first obtaining from the department a license for such purpose. The fee for such license and the annual renewal thereof shall be twenty-five dollars. These fees shall be payable to the "Preneed Burial Contract Regulation Fund" established by section three {§ 47-14-3} of this article.



The commissioner shall not issue such license without requiring an applicant for the license, or if the applicant is a corporation, its individual agents, to provide proof to warrant its issuance by presenting with the application affidavits from his employer stating that, to the employer's best information, knowledge and belief the applicant merits a license. The acts of the agent shall be considered acts of the employer. The department may require the applicant to pass a written examination to ascertain if the applicant has sufficient knowledge of the industry and the provisions of this article to properly carry on the business covered by this article. (1983, c. 161.)



**§ 47-14-5. Disposition of proceeds;
trusts; procedure for administration;
department to promulgate rules and
regulations.**

(a) All sums paid or collected on such contracts entered into after the effective date (June 7, 1983) of this article shall be handled in the following manner:

(1) The contract seller or other person collecting the funds may retain for his own use and benefits and for the purpose of covering his selling expenses, servicing costs and general overhead, an amount not to exceed ten percent of the total amount agreed to be paid by the contract buyer as reflected in the preneed funeral contract. Such ten percent or other amount is exempt from the trust and refunding provisions of this article;



(2) All of the funds collected under the contract, less the amount authorized to be deducted under subdivision (1) of this subsection shall be deposited under the provisions of subdivision (3) hereof;

(3) Unless otherwise specifically exempt under this article, all funds paid to or collected by any person from a preneed funeral contract shall, within thirty days after receipt thereof by such a person, be deposited in this State (i) in the name of a trustee who is a contract seller, provider or person making the preneed funeral contract available, in a state or federally chartered and insured bank, savings institution, building and loan institution located in this State or in a state or federally chartered credit union located in this State, or (ii) under the terms of a trust instrument entered into with a national or state bank having



trust powers or a trust company located in this State.

(b) The funds to be deposited from more than one preneed funeral contract may at the option of the recipient thereof or the certificate of authority holder, be placed in a common or commingled trust fund in this State under a single trust instrument.

(c) All deposits shall be placed in an account with a trustee in the name of the contract seller, provider or person making the contract available, as set forth in the contract seller, to whom the contract buyer makes payment. Records shall be maintained as to each contract showing the amount paid, the amount deposited and the amount invested with respect to any particular buyer's contract.

(d) All funds required to be deposited and covered by this article shall remain in this State.



(e) All accounts of money deposited in any bank, savings institution, building and loan association or credit union in accordance with the provisions of this article are subject to periodic examination by the department of banking of this State.

(f) The department shall promulgate rules and regulations in accordance with chapter twenty-nine-A {§ 29A-1-1 et seq.} of this Code for the purpose of administering the provisions of this article: Provided, That the department shall, by such rules and regulations, require the contract seller to secure a fidelity bond of sufficient surety to guarantee that a contract purchaser who cancels a contract under the provisions of this article receives all of the moneys paid into any trust account. (1965, c. 145; 1974, c. 95; 1983, c. 161.)



§ 47-14-6. Withdrawal of funds.

(a) Disbursements of funds discharging any preneed funeral contract shall be made by the trustee to the person named in the contract upon receipt of a certified photostatic copy of the death certificate of the contract beneficiary and evidence satisfactory to the trustee that the preneed funeral service or preneed burial supply contract has been fully performed. In the event that, after the death of the contract beneficiary, the contract services or goods are not provided because they are not desired by the heirs or by the personal representatives of the contract beneficiary, the trustee shall have authority to expend one hundred percent of the amount placed in the trust account and paid on the contract, in any general locality within or outside of this State, which shall be the burial



location of the contract beneficiary. If the service and goods are not provided upon the death of the contract beneficiary because of actions of the seller, provider or person making the preneed funeral contract available, then all of the funds held on deposit shall in ten days be refunded to the contract buyer or his legal representative who also has available any other remedy set forth in this article.

(b) Any contract buyer or legally authorized person, acting in his behalf, may cancel a preneed funeral contract prior to death of the contract beneficiary by notifying in writing the contract seller or present obligor of the provisions thereof, if a different person, of such desire to cancel. The seller or obligor shall, in ten days after receipt of such notice, notify the trustee of such cancellation and the trustee



shall within thirty days after receipt of written notification pay to the contract buyer, or his legal representative, all funds placed in the trust account and paid on the contract.

(c) If the contract buyer is more than one hundred eighty days in default with respect to any payment or installment due on or pursuant to the preneed funeral contract, the contract seller or provider may, on ten days' prior written notice, cancel the contract. All funds in the trust account shall be refunded to the contract purchaser or to the estate of the contract beneficiary.

(d) The seller of a preneed funeral contract may not cancel the contract unless the contract is in default as to the buyer's obligations.

(e) Payment by any depository or any trustee made in good faith pursuant to the



terms of this section shall forever relieve such depository or trustee, as such, for any further liability for such funds under the contract and in law. (1955, c. 153; 1965, c. 145; 1983, c. 161.)

§ 47-14-7. Income on trust accounts.

(a) Whether the payments on a preneed funeral contract are placed in a bank, savings institution, building and loan association, credit union or in a common trust fund s permitted in this article, or are part of a commingled common trust fund as permitted in this article, the income from a contract deposit shall accrue to the individual account until such time as the burial goods, funeral goods and funeral services for the contract beneficiary are required to be delivered and returned by reason of such beneficiary's death.



(b) Upon the death of such contract beneficiary, the total amount in the trust account attributable to the contract beneficiary, the total amount in the trust account attributable to the contract beneficiary shall be disbursed as follows:

(1) If the cost of the goods and services contracted for at the time of such beneficiary's death exceeds the amount paid under the contract, then the provider may have and use the principal and so much of the interest as may be necessary to defray such additional cost over and above the contract cost:

Provided. That, to the extent that the cost of goods and services provided exceeds the principal and interest thereon, the provider shall provide and make available the goods and services contracted for at no additional cost to the contract purchaser or to the



heirs or personal representative of the contract beneficiary.

(2) To the extent the principal and interest thereon exceed the cost of the goods and services contracted for, then the provider may retain only so much of the principal and interest necessary to defray the total of such cost and the balance shall be returned to the estate of the contract beneficiary or to the contract buyer as may be proper under the provisions of this article or the rules and regulations of the department.

(c) The trustee for the trust shall make annual valuations of assets held in trust. No person may withdraw income from the trust, except for the purpose of executing the terms of the contract and to disburse the trust proceeds as provided in subsection (b) of



this section. (1955, c. 153; 1965, c. 145; 1983, c. 161.)

§ 47-14-8. Limitations on enforcement of contract; appointment and removal of trustees; standards for administration of trusts; contracts may be irrevocable; "Preneed Guarantee Fund" established; assignment of contract allowed; credit life insurance allowed; successor in interest defined.

(a) A contract seller, provider or person making the preneed funeral contract available may not enforce a preneed funeral contract made in violation of this article, but a contract buyer or his heirs or legal representative may recover all amounts paid under his contract and all accrued income on such amount where the contract seller, provider or person making the preneed funeral



contract available has violated the provisions of this article as to such contract. The right of such recovery is in addition to the remedy provided for in section twelve {§ 47-14-12} of this article.

(b) A contract seller, provider or person making the preneed funeral contract available may appoint a board of at least three individual trustees under a trust instrument, if the trustee is other than a chartered state or national bank or trust company under the supervision of the department of banking of this State, to serve as trustees of its trust funds. Each individual trustee shall be a resident of this State and shall hold office subject to the direction of the seller. Not more than one member of the board of trustees of a trust fund may have a proprietary interest in the seller appointing trustees or in any

certificate of authority holder who is placing funds in such trust.

Individual trustees of a trust fund shall file a fidelity bond with the corporate surety thereon which is licensed to do business in this State with the department of labor in an amount equal to the funds in trust, guaranteeing payment of damages occasioned by breach of the trustee's fiduciary duties. The trustees of one or more trust funds need file only one such bond. The aggregate liability of the surety shall in no case exceed the face amount of the bond. The department of labor or any aggrieved person claiming against any bond required by this section may maintain any action against the trustee and the surety. Individual trustees shall take no action respecting trust funds unless there is on file with the department a bond as required



by this section. If the trustees are individuals, the commissioner may suspend the certificate of authority of any contract seller, provider or person making the preneed funeral contract available having trust funds with respect to which there is no bond on file with the department as required by this section.

(c) All trustees under the terms of this article are subject to the following investment standards: In acquiring, investing, reinvesting, exchanging, retaining, selling and managing property for the benefit of others, trustees have the responsibilities which customarily attach to such offices and to the type of estates entrusted to their care and shall exercise the judgment and care under the circumstances then prevailing which men of prudence, discretion and intelligence exercise in the



management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital.

(d) No preneed funeral contract may restrict any contract buyer who, for the purpose of receiving public assistance, may make his or her contract irrevocable in accordance with the laws and regulations of this State.

(e) All preneed funeral contracts must be in writing and no contract form may be used without prior approval of the department.

(f) Each contract buyer shall pay a fee of five dollars to the contract seller, who in turn will forward such sum to the department within ten days after execution of the preneed funeral contract. The contract



shall be recorded in the department. Within ten days after receiving the fee, the department will notify the contract purchaser, by mail, of the recording. The fees shall be placed by the department in an account under the department's control entitled "Preneed Guarantee Fund," and the income thereon shall accrue to the fund. The department may use such income, if necessary in its discretion, to enforce this article.

In the event any buyer of any preneed funeral contract is unable to receive the benefits of his contract, or to receive the funds due by reason of his cancellation thereof, such buyer may apply to the department, on a form supplied by the department. Upon the finding of the department that said benefits or return of payment is not available to the buyer, the department will cause to be paid to the said



buyer from the "Preneed Guarantee Fund" the amount actually paid by the buyer under his or her contract. If the seller's liability for default is subsequently proven, any award made by a court of law shall be made payable to the "Preneed Burial Contract Regulation Fund" established in section three {§ 47-14-3} of this article.

(g) Notwithstanding the provisions of subsection (f), section five {§ 47-14-5(f)} of this article, delivery of funeral or burial goods prior to the death of the person for whose benefit they are purchased does not constitute performance or fulfillment, either wholly or in part, of any preneed contract or series of contracts.

(h) The contract buyer may, on acceptance in writing by a transferree, transfer the obligations of the seller, provider or person making the preneed funeral



contract available to other persons within or without this State. The funds on deposit for the contract on any future payments, if any, by the contract buyer shall then be transferred to and deposited under applicable state law, if any, in the state wherein the contract buyer resides or to a state where the obligations of the provider of the funeral service and goods will be fulfilled.

Upon such transfer, the contract buyer and transferee shall, in writing, release the contract seller, provider or person making the preneed funeral contract available and the trusts, as applicable, for any further liability under such contract.

Nothing in this article or in any preneed contract may limit the right of a contract buyer to assign such a contract to any person whomsoever except as specifically provided herein and except that if the assignee is a

resident of this State or the contract is to be fulfilled by the assignee in this State, the assignee must hold a certificate of authority under this article. If the contract is to be fulfilled in another state, the assignee must in all respects be in compliance with the preneed funeral law of that state, if any.

(i) Notwithstanding any other law of this State, a contract seller, provider or person making the preneed funeral contract available, may if requested by the contract buyer where the contract is to be paid installments, provide for the sale of credit life insurance on the life of the contract beneficiary in order to have the funds necessary to make payment in full under the contract if the beneficiary should die prior to completing all the payments due. The seller shall disclose all costs of such



insurance in clear language and shall inquire of the buyer whether he understands the terms of the insurance contract and is aware of the total cost of the insurance.

(j) In the event any certificate of authority holder or anyone in violation of the article who has outstanding preneed funeral contracts and is not the current holder of a certificate of authority sells its business, through the sale of assets or stock, which is involved in the fulfillment of obligations under preneed funeral contracts, the buyer of such business is a "successor in interest" and is covered not only by this article but shall assume the obligations of seller under seller's outstanding preneed funeral contracts regardless of whether seller made known to buyer the existence of such contract or contracts. (1983, c. 161.)

§ 47-14-9. Forms and rules.

The administration and enforcement of the provisions of this article are vested in the department. The department shall prepare and furnish all forms necessary under this article, including forms for applications for certificates of authority, for renewals thereof, for annual statements, for other required reports and for preneed funeral contracts. The department shall promulgate, in accordance with the provisions of chapter twenty-nine-A {§ 29A-1-1 et seq.} of this Code, such rules and regulations as may be necessary to effectuate the purpose of this article. (1983, c. 161.)

§ 47-14-10. Solicitation.

(a) Any contract seller or agent or employee or person acting in behalf of any such person may not:

(1) Directly or indirectly call upon individuals or person in hospitals, rest homes, nursing homes, or similar institutions of the purpose of soliciting preneed funeral contracts or making funeral or final disposition arrangements without first having been specifically requested by such person to do so;

(2) Directly or indirectly employ any agent, assistant, employee, independent contracting person or any other person to call upon individuals or persons in hospitals, rest homes, nursing homes or similar institutions for the purpose of soliciting preneed funeral contracts or making funeral or final disposition arrangements without first having been specifically requested by such person to do so;



(3) Solicit relatives of persons whose death is apparently pending or whose death has recently occurred for the purpose of providing funeral services, final disposition, burial or funeral goods for such person;

(4) Solicit or accept or pay any consideration for recommending or causing a dead human body to be provided funeral services and funeral and burial goods by specific persons, or the services of a specific crematory, mausoleum or cemetery except where such arrangement is the subject of a preneed funeral contract;

(5) Solicit by telephone call or by visit to a personal residence, unless such solicitation has been previously has been previously requested by the person solicited or by a family member residing at such residence.

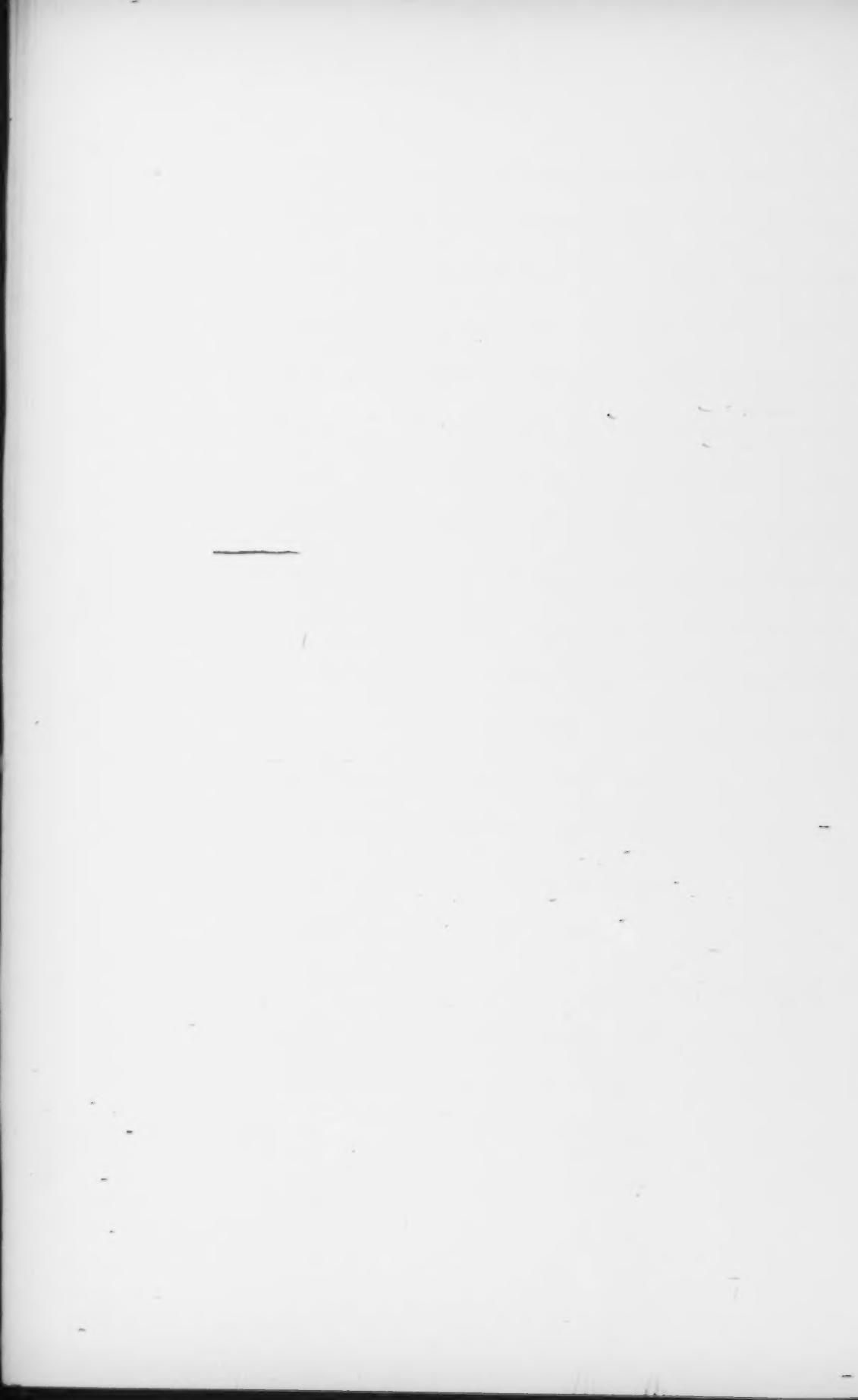


(b) Notwithstanding any other provision of law to the contrary, nothing in this article shall be construed to restrict the right of a person to lawfully advertise, to use direct mail or otherwise communicate in a manner not within the above prohibition of solicitation or to solicit the business of anyone responding to such communication or otherwise initiating discussion of the goods or services being offered.

(c) Nothing herein shall be construed to prohibit general advertising.

(d) Anyone making a personal or written solicitation for a preneed funeral contract shall, at the very first instance, divulge the real reason for the contract or solicitation.

(e) The department may adopt rules regulating the solicitation of preneed contracts by certificate holders or



registrants to protect the public from solicitation practices which utilize undue influence or which take undue advantage of a person's ignorance or emotional vulnerability. (1983, c. 161.)

§ 47-14-11. Disciplinary proceedings; revocation of license or certificate; liquidation upon violation.

(a) The following acts constitute grounds for which the disciplinary actions in subsection (b) may be taken against any person holding a certificate of authority or license pursuant to this article:

- (1) Violating any provisions of this article;
- (2) Attempting to procure or procuring a certificate of authority or license under this article by bribery or fraudulent misrepresentation;



(3) Having had any certificate of authority or license to sell preneed funeral contracts revoked, suspended or otherwise acted against, including denial of licensure, by a licensing authority of another jurisdiction;

(4) Being convicted or found guilty of a crime in any jurisdiction which directly relates to the sale of preneed funeral contracts;

(5) Making or filing a report required by this article which the certificate holder knows to be false or knowingly failing to make or file a report required by this article;

(6) Advertising goods or services in a manner which is fraudulent, false, deceptive or misleading in form or content;

(7) Engaging in fraud, deceit or misrepresentation in the conduct of business of the certificate holder;

(8) Failing to comply with a lawful order of the department;

(9) Knowingly making any false or misleading statement, oral or written, directly or indirectly, regarding the sale of services or merchandise in connection with the conduct of the certificate holder's business;

(10) Not maintaining the funds received under the contracts as required by this article;

(11) Failing to cancel a preneed funeral contract upon proper request and refund that portion of the amount paid on such a contract as required by this article;

(12) Failing to renew or qualify for renewal of its certificate of authority or license;

(13) Failing to produce records in connection with the certificate holder's business or has otherwise failed to comply with the provisions of this article or any rule promulgated by the department pursuant to this article; or

(14) Soliciting by the certificate holder, its agents, employees or representatives through the use of fraud, undue influence, misrepresentation or over-reaching or other forms of vexatious conduct as defined by law, this article or the rules and regulations of the department a to preneed funeral contracts.

(b) Upon the violation of any of the provisions of this article, determined in an administrative hearing after notice and an opportunity to be heard, the department may institute revocation proceedings regarding a license to operate a funeral home or a certificate of authority to sell preneed

funeral contracts, or both the license and the certificate of authority or file a complaint in a court of competent jurisdiction setting forth the relevant facts and praying for the issuance of an order to show cause why the license to operate a funeral home or the certificate of authority to sell preneed funeral contracts, or both the license and the certificate should not be revoked.

(1) Upon application for such rule to show cause, the court may, in its discretion, issue an injunction restraining the defendant from transacting further business until further order of the court.

(2) Upon return of such order to show cause, the court shall hear and try the issue forthwith. If the court determines that the person so charged as defendant in such



proceeding has not been guilty of the omission, failure or violation alleged in the complaint by the department, the court shall dismiss such complaint. If the court finds that the charges of the department are supported by the evidence, it may enter an order directly the revocation of a license to operate a funeral home or of a certificate of authority to sell preneed funeral contracts, or the revocation of both the license and the certificate of authority.

(3) In any such order of liquidation or in any order or orders thereafter entered, the court shall provide a notice to creditors, filing of claims and all other details necessary and essential to an estate in receivership.

(c) When the department finds any certificate holder or licensee guilty of any



of the acts set forth in subsection (a) of this section after an administrative hearing, or finds that any funeral services or funeral or burial goods are offered for sale when the offer is not a bona fide offer to sell such services or goods, it may enter an order imposing one or more of the following penalties:

- (1) Denial of an application for a certificate of authority or license, including a renewal;
- (2) Revocation or suspension of a certificate of authority or license;
- (3) Imposition of an administrative fine not to exceed one thousand dollars for each count where there are separate violations;
- (4) Issuance of a reprimand; or
- (5) Placement of the licensee or certificate holder on probation for a period of time and subject to such conditions as the department may specify.



(d) All preneed funeral contract buyers have a priority in claims against the provider, to the extent that their interest is set forth in this article.

(e) For purposes of this section, the acts or omissions of any person employed by or under contract to or on behalf of the certificate holder shall be treated as acts or omissions of the certificate holder.

(f) Subject to the provisions of subsection (b), section seven {§ 47-14-7(b)} of this article, all prices or quotations of prices contained in any preneed funeral contract shall be fully and clearly stated.
(1983, c. 161.)

**§ 47-14-12. Civil action;
attorney's fees.**

(a) The failure of a certificate holder or licensee to comply with the provisions of this article gives rise to a civil cause of



action in favor of any aggrieved consumer or contract purchaser. Upon entry of a judgment for damages in favor of the plaintiff, the trial court shall award punitive damages in the amount of three times the actual damages awarded in the judgment.

(b) The prevailing party, after judgment in trial court and exhaustion of all appeals, if any, shall receive reasonable attorney's fees and costs from the nonprevailing party.

(c) The attorney for the prevailing party shall submit a sworn affidavit of his time spent on the case and his costs incurred for all the motions, hearings and appeals to the trial judge who presided over the civil case.

(d) The trial judge shall award the prevailing party the sum of reasonable costs incurred in the action, plus a reasonable legal fee for the hours actually spent on the case as sworn to in an affidavit.



(e) Any award of attorney's fees or costs shall become part of the judgment and subject to execution as the law allows. (1983, c. 161.)

§ 47-14-13. Penalty.

Any person who receives, holds, manages or controls any funds or proceeds realized from the writing and issuing of a preneed funeral contract or disburses such funds or proceeds in any manner other than as authorized or required by this article or who has violated any of the provisions of this article or the rules and regulations promulgated hereunder is guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than one hundred nor more than one thousand dollars for each occurrence, or imprisoned in the county jail for a term not to exceed one year or both fined and imprisoned. (1955, c. 153; 1965, c. 145; 1983, c. 161.)



§ 47-14-14. Severability.

If any section, subsection, subdivision, subparagraph, sentence or clause of this article is adjudged to be unconstitutional or invalid, such invalidation shall not affect the validity of the remaining portions of this article, and, to this end, the provisions of this article are hereby declared to be severable. (1955, c. 153; 1965, c. 145; 1983, c. 161.)

89-639

NO. _____

(3)

Supreme Court, U.S.

FILED

AUG 29 1989

JOSEPH F. SPANIOL, JR.

CLERK -

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

NATIONAL FUNERAL SERVICES, INC.

Petitioner,

v.

JOHN D. ROCKEFELLER, ET AL

Respondent.

APPENDIX

BOOK II
Pages B1 - B75

Robert S. Kiss
John A. Hutchison
Gorman, Sheatsley, & Hutchison, L.C.
343 Prince Street
P.O. Drawer AU
Beckley, West Virginia 25802-2843
(304) 252-5321

10/30



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

NATIONAL FUNERAL SERVICES,)
INC.,)
Plaintiff,)
v.) Civil Action
JOHN D. ROCKEFELLER, IV,) No. 83-2299
et al.,)
Defendants.)

and

MOUNTAIN STATE FUNERAL)
ASSOCIATION,)
Plaintiff,)
v.) Civil Action
STATE OF WEST VIRGINIA,) No. 83-2300
et al.,)
Defendants.)

MEMORANDUM OPINION

Plaintiffs, National Funeral Services, Inc. (National), and Mountain State Funeral Association (Mountain State), filed these actions challenging, *inter alia*, the



constitutionality of West Virginia Code, § 47-14-1, et seq., as amended- (§ 47-14-1, et seq.) as contained in Enrolled House Bill No. 1269, enacted by the West Virginia Legislature on March 9, 1983. On July 7, 1985, this Court entered a preliminary injunction to maintain the status quo until a mature decision could be made upon the merits herein.

The matter came on for hearing on December 13, 1985. After hearing argument of counsel, reviewing the briefs filed herein, and considering the record as a whole, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Plaintiff, Mountain State, is a nonprofit corporation organized and existing under the laws of the State of West Virginia. Some members of Mountain State engage in the sale of preneed burial and funeral contracts.



2. Plaintiff, National, is a private corporation organized and existing under the laws of the State of West Virginia and engages in the selling of preneed funeral services.

3. Defendant, State of West Virginia, through its commissioner of labor, is charged with enforcement of the statute aforesaid.

4. The offering and sale of preneed burial contracts in the State of West Virginia are and have been since June 10, 1985 - subject to regulation under the provisions of § 47-14-1, et seq. -

5. The members of Mountain State and National, insofar as they engage in the sale of preneed funeral services, would be subject to the provisions of § 47-14-1, et seq., and such statute is intended to regulate the sale of preneed funeral services.



6. The statute does not in any way prohibit the solicitation of business by the plaintiffs or any person by various advertising media such as newspapers, radio, television, handbills, or direct mail.

7. Cemeteries in West Virginia own real property. Plaintiff, National, however, does not own any real property in West Virginia, and little, if any, personal property. Its assets in the state, if any, are minimal.

8. Even though door-to-door sales and telephone solicitations are prohibited by the statute, except upon request of an interested purchaser, preneed sales businesses have been shown to be profitable even with the 100% trusting requirement. The preneed sales businesses can be operated in compliance with the statute at a profit by the exercise of good business practices.



9. Plaintiff, National, has derived significant profits from its business in the state in past years, and at the same time has maintained in the state insignificant tangible assets.

10. Plaintiff, Mountain State, has insignificant assets. However, those of its members who sell preneed contracts are in the regular business of selling funeral goods and services at a profit and do have business assets.

11. The Federal Trade Commission (FTC) regulates certain aspects of funeral industry practices. 16 C.F.R. § 453; Fed. Reg. July 9, 1985, at 28062.

CONCLUSIONS OF LAW

1. This Court has jurisdiction pursuant to 28 U.S.C. § 1332 and 28 U.S.C. § 1343(3).

2. Section 47-14-1, et seq., was enacted on March 9, 1983, and immediately



thereafter, defendants were enjoined from the enforcement of its provisions. Section 47-14-1, et seq. has never been in force or in effect. Plaintiff, National, made the voluntary business decision to leave the marketplace. This plaintiff has never done any business whatsoever under the requirements of § 47-14-1, et seq. Any possible harm to plaintiff's constitutional rights is totally conjectural, hypothetical, speculative, unsupported and unproved.

3. The provisions of § 47-14-1, et seq., are neither prohibitory nor confiscatory. The provisions of the statute in no way impede the operation of a preneed business, although the possibility of a diminution in profitability of such business could conceivably result therefrom.

4. Section 47-14-1, et seq., though imposing a restriction on the time, place or manner of expression, is a constitutionally

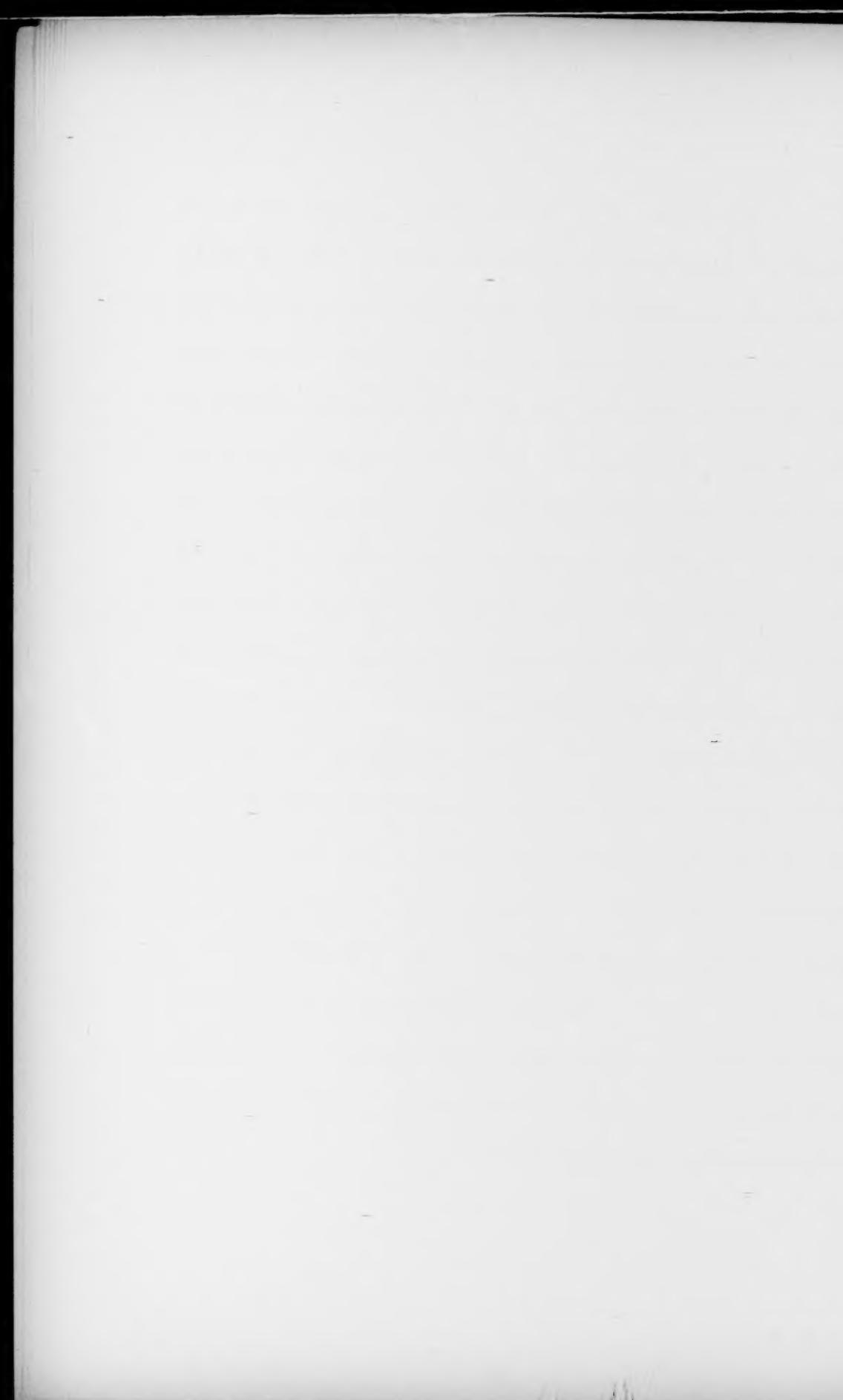


permissible restriction in that the restriction is justified without reference to the content of the regulated speech. It serves a significant governmental interest, and, finally the restriction leaves open and ample alternative channels for communication of the information. Solicitations for personal professional services such as preneed are properly subject to regulation to protect the consumer.

5. The record in this case clearly establishes a rational basis for state's action. The state had a significant governmental interest in protecting the public from solicitation practices which utilize undue influence on a person's lack of information or emotional vulnerability. A clear and rational distinction, that of tangible real property assets, exists between the cemetery and the type of preneed business activity engaged in by the plaintiffs.



6. The FTC Trade Regulation Rule on Funeral Industry Practices (16 C.F.R. § 453) does not preempt § 47-14-1, et seq. Prior to the effective dates of that Rule, there was no federal regulation of the preneed funeral services industry. The FTC Rule regulates certain narrowly defined aspects of the preneed funeral services industry. The FTC Rule regulates certain narrowly defined aspects of the preneed industry. The FTC Rule regulates the actual content of solicitations. The State statute is silent on content but instead regulates the manner in which solicitations are to be made. The manner of solicitation is appropriately subject to state action. The FTC Rule and § 47-14-1, et seq., regulate completely different and distinct practices. The State statute neither conflicts with nor contradicts the FTC Rule.



7. Section 47-14-1, et seq., (1) has no more than incidental effect on interstate commerce; (2) was directed against certain real evils; (3) was a valid exercise of police power; and (4) was reasonable and nondiscriminatory. Section 47-14-1, et seq., meets the constitutional requirements of the Commerce Clause.

8. Section 47-14-1, et seq., will not impose expansive additional filing and licensing requirements which will impair existing contracts or impair the rights of parties to enter into contracts.

Accordingly, the Court is of the opinion that the Preliminary Injunction previously entered herein should be dissolved and that House Bill 1269, Acts of the Legislature, Chapter 47, Article 14, Reg. Session, 1983, amending and reenacting West Virginia Code, § 47-14-1, et seq., is fully in accord with



both the Constitution of the United States
and the State of West Virginia.

The Clerk is directed to mail certified
copies of this Memorandum Opinion to counsel
of record herein.

DATED: April 16,
1986

~~DENNIS R. KNAPP, JUDGE~~

FILED: April 16,
1986

In Clerk's Office U.S.
Dist. Court So. Dist.
of W.Va.
Ronald D. Lawson, Clerk



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

NATIONAL FUNERAL SERVICES,)
INC.,)
Plaintiff,)
v.) Civil Action
) No. 83-2299

JOHN D. ROCKEFELLER, IV,)
et al.,)
Defendants.)

and

MOUNTAIN STATE FUNERAL)
ASSOCIATION,)
Plaintiff,)
v.) Civil Action
) No. 83-2300
STATE OF WEST VIRGINIA,)
et al.,)
Defendants.)

JUDGMENT ORDER

In accordance with the Court's
Memorandum Opinion of even date herewith, it



is hereby ORDERED that the Preliminary Injunction entered herein be dissolved. The Court further finds and ADJUDGES that House Bill 1269, Acts of the Legislature, Chapter 47, Article 14, Reg. Session, 1983, amending and reenacting West Virginia Code, § 47-14-1, et seq., is fully in accord with both the Constitution of the United States and the State of West Virginia.

The Clerk is directed to mail certified copies of this order to counsel of record herein.

DATED: April 16, 1986

DENNIS R. KNAPP, JUDGE

ENTERED: April 16, 1986

ORDER BOOK NO. 128
PAGE 6



UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-3945

NATIONAL FUNERAL SERVICES,)
INC., a West Virginia)
corporation,)
Plaintiff - Appellant,)
v.)
JOHN D. ROCKEFELLER, IV,)
Governor of the State of)
West Virginia, STATE OF)
WEST VIRGINIA DEPARTMENT)
OF LABOR, a department)
of the State of West)
Virginia, LAWRENCE)
BARKER, Commissioner of)
the Department of Labor)
of the State of West)
Virginia,)
Defendants - Appellees)

and

AMOS QUESENBERRY, an)
individual; RICHARD)
QUESENBERRY, an individual;)
ROSE & QUESENBERRY FUNERAL)
HOME, INC., a West Virginia)
Corporation; THOMAS)
SEAVERS, an individual;)
SEAVERS FUNERAL HOME, INC.,)
a West Virginia corporation;)
THE WV FUNERAL DIRECTORS)
ASSOCIATION, a West Virginia)



association; ROGER PRICE,
Executive Director of the
West Virginia Funeral
Directors Association, a
West Virginia Association;
JOSEPH CHRISTIAN, an
individual; MELVIN T.
STRIDER COMPANY,
INCORPORATED; COLONIAL
FUNERAL HOMES; EACKLES
FUNERAL HOME, INCORPORATED;
ROBERT SPENCER, an
individual,

On Petition for Rehearing in Banc

ORDER

The appellant's petition for rehearing in banc were submitted to this Court. In a requested poll of the Court by Judge Kiser, Chief Judge Ervin and Judges Winter, Russell, Widener, Hall, Phillips, Marnaghan, Chapman, Wilkinson, and Wilkins voted to deny rehearing in banc. Judge Sprouse was disqualified from participating in the poll.



As the poll failed for lack of majority support,

IT IS ADJUDGED and ORDERED that the petition for rehearing in banc is denied.

Entered at the direction of Judge Hall.

For the Court,

CLERK

FILED

U.S. Court of
Appeals Fourth
Circuit



UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-3945

NATIONAL FUNERAL SERVICES,)
INC., a West Virginia)
corporation,)
Plaintiff - Appellant,)
v.)
JOHN D. ROCKEFELLER, IV,)
Governor of the State of)
West Virginia, STATE OF)
WEST VIRGINIA DEPARTMENT)
OF LABOR, a department)
of the State of West)
Virginia, LAWRENCE)
BARKER, Commissioner of)
the Department of Labor)
of the State of West)
Virginia,)
Defendants - Appellees)

and

AMOS QUESENBERRY, an)
individual; RICHARD)
QUESENBERRY, an individual;)
ROSE & QUESENBERRY FUNERAL)
HOME, INC., a West Virginia)
Corporation; THOMAS)
SEAVERS, an individual;)
SEAVERS FUNERAL HOME, INC.,)
a West Virginia corporation;)
THE WV FUNERAL DIRECTORS)
ASSOCIATION, a West Virginia)
association; ROGER PRICE,)



Executive Director of the)
West Virginia Funeral)
Directors Association, a)
West Virginia Association;)
JOSEPH CHRISTIAN, an)
individual; MELVIN T.)
STRIDER COMPANY,)
INCORPORATED; COLONIAL)
FUNERAL HOMES; EACKLES)
FUNERAL HOME, INCORPORATED;)
ROBERT SPENCER, an)
individual,)
Defendants.)

Appeal from the United States District Court
for the Southern District of West Virginia at
Charleston. Dennis R. Knapp, Senior District
Judge. (CA-83-2299)

Argued: November 3, 1988

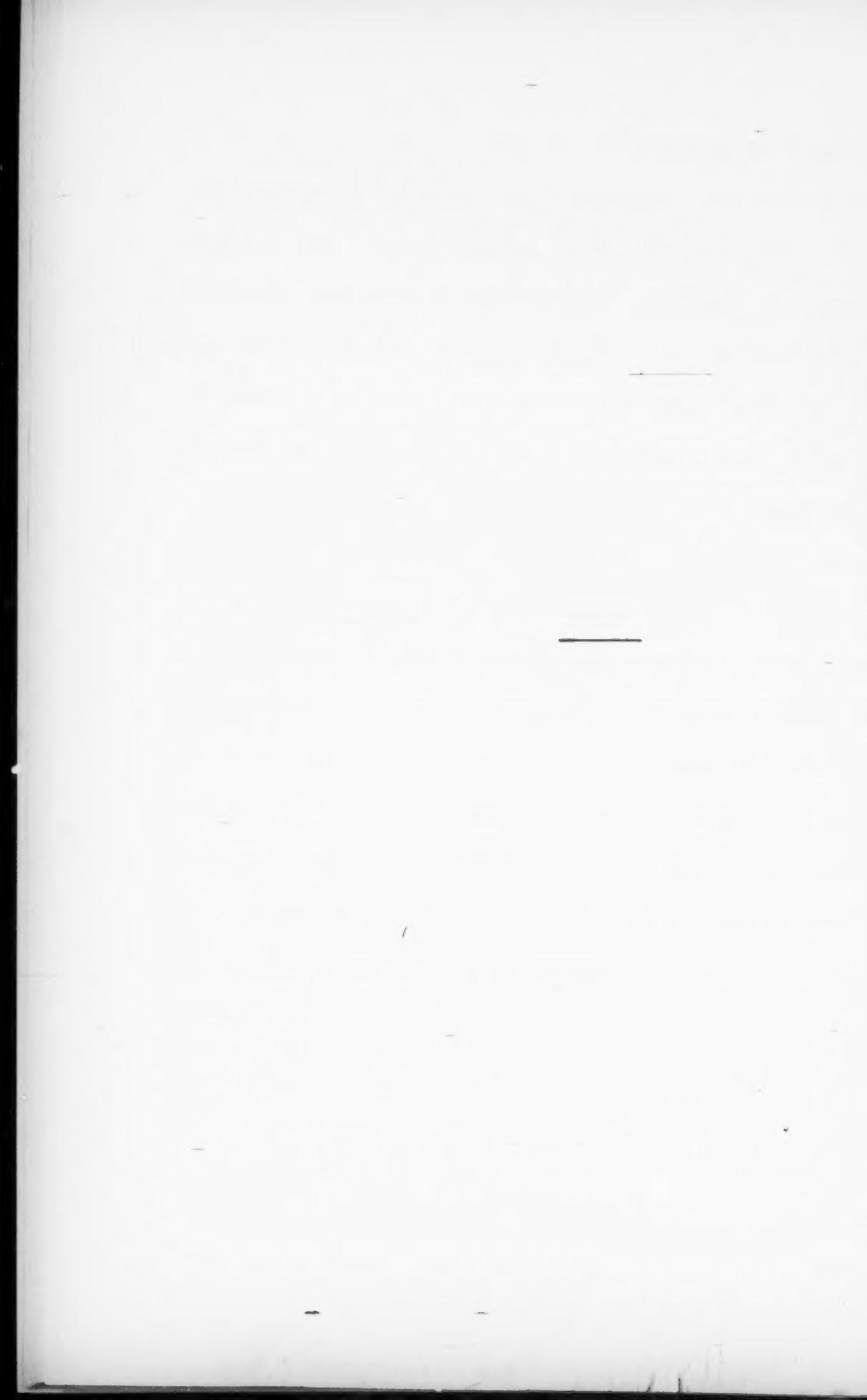
Decided: March 7, 1989

Before HALL, Circuit Judge, BUTZNER, Senior
Circuit Judge, and KISER, United States
District Judge for the Western District of
Virginia, sitting by designation.

Robert Stephen Kiss (John A. Hutchison, Earl Kent Hellems, GORMAN, SHEATSLEY, & HUTCHISON, L.C. on brief) for Appellant. Ann Adair Spaner, Senior Assistant Attorney General (Charles G. Brown, Attorney General, Thomas L. Hindes, Deputy Attorney General, Mark D. Kindt, Assistant Attorney General, on brief) for Appellees.

HALL, Circuit Judge:

In this declaratory judgment action, National Funeral Services ("NFS") appeals the district court's judgment, which upheld the constitutionality of W.Va. Code § 47-14-1 et seq. (1983) and found that the Act's provisions were not preempted by the Federal Trade Commission's ("FTC") Funeral Rule, 16 C.F.R. 453. On somewhat different reasoning, we affirm.



I

This case revolves around the State of West Virginia's attempt to regulate preneed funeral contracts, codified at W.Va. Code § 47-14-1 et seq. (1983).¹ These contracts have been tightly regulated in the state since 1955, when the West Virginia

¹ The statute provides its own definition of "preneed funeral contracts":

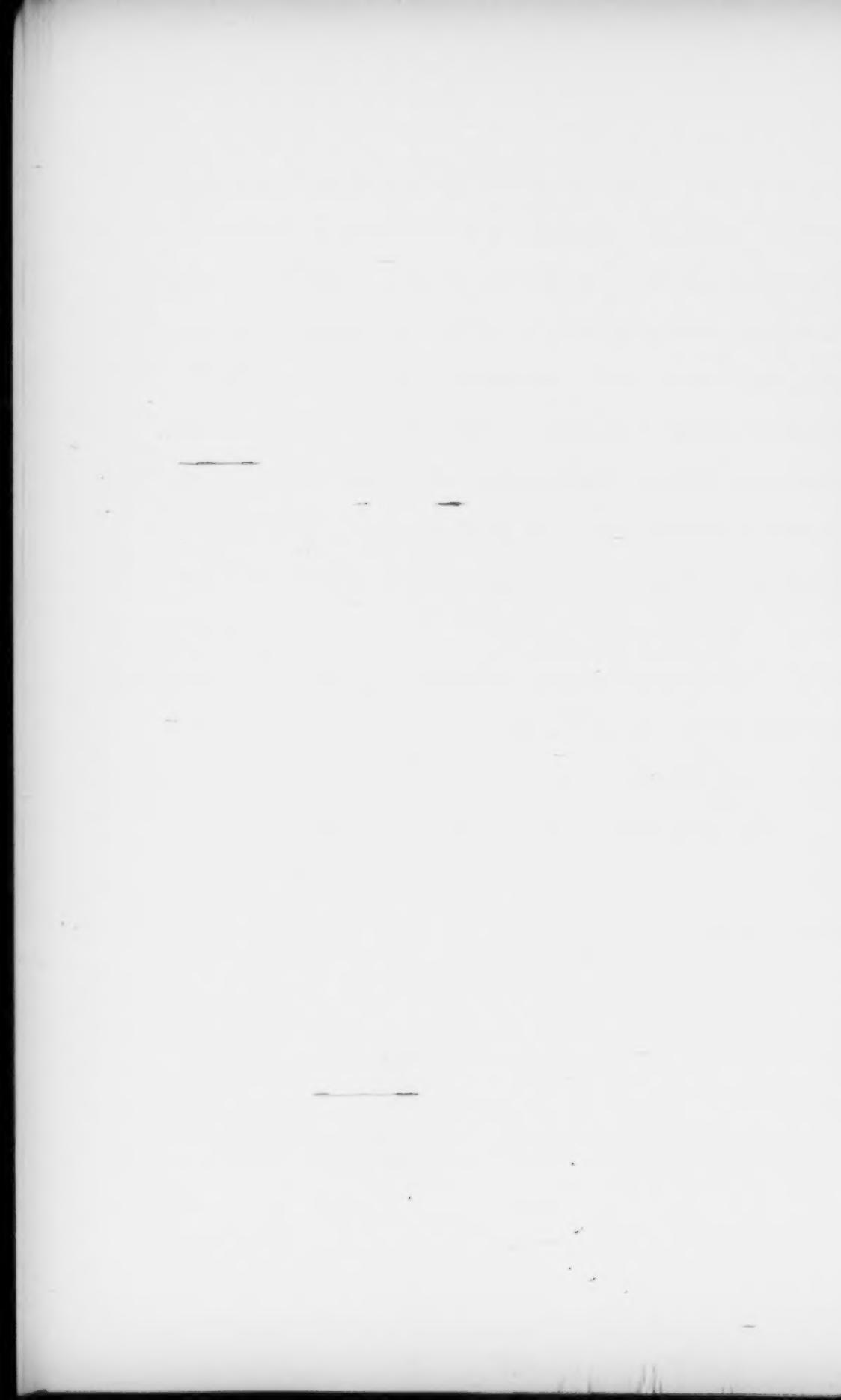
"Preneed funeral contract" means any contract, agreement, mutual understanding, series or combination of contracts, agreements and mutual understandings, other than a contract of insurance, under which, for a specified consideration paid in advance of death in a lump sum or by installments, a person promises to furnish or make available or provide funeral services, funeral goods or burial goods for use at a time determinable by the death of the "contract beneficiary" who is either named or implied.

W.Va. Code § 47-14-2(12) (1983).

legislature found them to be void and against public policy unless all of the contract proceeds were placed in trust, pending the contract beneficiary's time of need. W.Va. Code 47-14-1 (as amended in 1965, 1983). Unlike other states that have chosen to regulate these contracts through regulation of the funeral service profession, see Guardian Plans v. Teaque, No. 88-3101 (4th Cir., Mar. 7, 1989) (Virginia), West Virginia's regulatory scheme focuses on the methods of sale and the terms of the contracts themselves.

The statute establishes a comprehensive regulation of all preneed sales of burial goods, funeral goods, or funeral services,²

² These three terms are words of art defined by the statute. See W.Va. Code § 47-14-2(1), (7), (8) (1983). Roughly speaking, they encompass every good and service necessary from a corpse's initial preparation to its final entombment. Goods



and declares preneed contracts void unless they are drafted, solicited, and executed according to its dictates. W.Va. Code § 47-14-1 (1983). It regulates all sellers of such goods and services and requires that they be licensed by the state. Id. § 47-14-3. Likewise, all agents or employees of a seller, who participate in the sale of these contracts must be state certified. Id. § 47-14-4.

While the general advertisement of these contracts is not restricted, in an attempt to reduce fraud and preserve privacy, the statute prohibits in-person and telephonic

and services provided by cemeteries acting as such, however, are exempted from regulation. Such unregulated sales can encompass cemetery lots, markers, crypts, urns, or incidental related services. Nonetheless, cemeteries that attempt to provide other non-excluded goods and services on a preneed basis are subject to regulation.



solicitation of prospective purchasers in nursing homes, hospitals, and private residences, as well as the solicitation of relatives of persons near death. Id. § 47-14-10. Once a sale is made, the statute establishes elaborate procedures for entrusting the proceeds of the sale³ and for the disposition of the trust income. Id. § 47-14-5, 8. Also, the Act requires that a seller provide the promised services at the contract price, regardless of whether the price of the services at the time of need exceeds the trust corpus. Id. § 47-14-7. This price guarantee also requires that if the goods and services cost less than the proceeds, the difference must be refunded to the purchaser. Id. Finally, a contract must be revocable at all times by a purchaser;

³ The current statute requires that only ninety percent (90%) of contract proceeds be entrusted.



while only revocation for nonpayment is available to a seller. Id. § 47-14-6.

Consistent with its purpose of protecting consumers, the Act creates a civil remedy, complete with attorney fees, for any breach of its provisions. Further, criminal penalties are available for anyone who mishandles contract proceeds. Id. § 47-14-8.

It is obvious from this exhaustive regulatory scheme, as well as the express language of the statute itself, that the West Virginia legislature considers these contracts to be a threat to the consuming public. Id. § 47-14-10(e). Through its police powers, it has allowed them to exist only under carefully circumscribed conditions. It is from this perspective that we must view NFS's challenges.

NFS entered the preneed funeral service market in West Virginia in 1980. At that



time, the trust requirements⁴ of the statute had been ruled unconstitutional by an inferior state court. Consequently, NFS began its sales operation without having to comply with the statute's current measures. However, in 1982, the West Virginia Supreme Court of Appeals reinstated the statute's trust requirements, finding them fully constitutional. Whitener v. W.Va. Bd. of Embalmers and Funeral Directors, 169 W.Va. 153, 288 S.E.2d 543 (1982).

In the wake of this decision, the West Virginia legislature in 1983, substantially overhauled the statute to create the comprehensive regulatory framework present today. Prior to these amendments, many

⁴ Between 1965 and 1983, W.Va. Code § 47-14-1, et seq. (1983) required that 95% of preneed contract proceeds be entrusted.



aspects of the regulation were not present, including the solicitation restrictions. Shortly after this overhaul, NFS filed suit.

In the court below, NFS contended that the statute was preempted by federal regulation, challenged several aspects of the statute's constitutionality and sought a preliminary injunction against its implementation. NFS also alleged various antitrust claims against the West Virginia Funeral Director's Association and several individual funeral directors. Finding the potential for irreparable injury to NFS, the lower court granted a temporary restraining order and a preliminary injunction pending the final adjudication of the constitutional claims.

After a long period of posturing and negotiation, the antitrust claims were eventually settled and the case proceeded to



a bench trial on the challenges to the statute. The district court upheld the statute in all respects.⁵ This appeal followed.

II.

NFS's first contention is that the Funeral Rule, promulgated by the FTC, so pervasively regulates the funeral industry that it preempts West Virginia's extensive regulation of preneed funeral contracts. NFS's alternate contention is that the statute's prohibition of unrequested, in-home personal and telephonic solicitation violates

5 In the proceedings below, this case was consolidated with another suit brought by Mountain State Funeral Association, a nonprofit corporation that sold preneed funeral contracts. Mountain State did not appeal the district court's decision.



its right to free commercial speech.⁶ We address the preemption question first.

Beginning in 1972, the FTC conducted an extensive, nationwide investigation into funeral practices. What the investigation revealed was widespread fraudulent sales practices and a general reluctance of funeral directors to disclose the individual prices of the goods and services they marketed as packages. Harry and Bryant Co. v. FTC, 726 F.2d 993, 999-1001 (4th Cir. 1984), cert. denied 469 U.S. 820. In response to this

⁶ In the court below, NFS also argued that the Act's exemption from regulation of cemeteries, its restrictions on commercial speech, and its 90% trusting requirement were so irrational and arbitrary that they could not withstand due process/equal protection scrutiny. See New Orleans v. Dukes, 472 U.S. 297 (1976). The district court properly rejected this feckless argument. We need not address this issue though, because appellant conceded at oral argument that it was without merit. See also Whitener, supra (West Virginia court ruled that exemption of cemeteries and 95% trusting requirement in predecessor statute were unconstitutional).

national problem, the FTC promulgated the Funeral Rule, found at 16 C.F.R. § 453. The goal of the rule "is to lower existing barriers to price competition in the funeral market and to facilitate informed consumer choice." 47 Fed. Reg. 42260 (Sept. 24, 1982). It prescribes several fraudulent sales practices and mandates the pre-sale disclosure of prices to consumers. Specifically, it requires the disclosure of prices to consumers who request such information over the telephone. 16 C.F.R. § 453.2(b)(1)(i). Notably, the rule does not focus on the preneed funeral market, but on the much larger at-need market.

The gist of Appellant's preemption argument is that the trusting requirements of the Act, coupled with its prohibitions on solicitation, make it impossible for appellant to profitably stay in business.

Thus the argument goes, this regulation insulates the marketplace from NFS's competition and, consequently, restricts the widespread dissemination of funeral price and product information mandated by the FTC's Funeral Rule. Appellant maintains that the Act's prohibition of door-to-door and telephone solicitation is particularly opposed to the strong public policy behind the Funeral Rule. We find this argument unpersuasive.

In determining whether federal regulation preempts concurrent state regulation, three inquiries are relevant: (1) whether the federal regulation is so pervasive that it is reasonable to assume that Congress did not intend for state regulation; (2) whether the field regulates is an area of such dominant federal interest that preclusion of state regulation must be

assumed, and; (3) whether simultaneous enforcement of the state regulation raises the serious danger of conflict with the federal program. Commonwealth of Pennsylvania v. Nelson, 350 U.S. 497, 502-505 (1956). This test, applied to the case at hand, clearly shows that West Virginia's regulation is not preempted.

First, we note that the Funeral Rule is a limited regulation focusing on fraudulent sales practices and price disclosure. 47 Fed. Reg. 42260-61 (Sept. 24, 1982). It simply does not attempt a comprehensive regulation of the funeral industry. Furthermore, there is no language in the Funeral Rule that even alludes to an intent to preempt state regulation in the area it does cover. In fact, the Rule expressly states that where a state law is applicable to any transaction that the Rule covers, and

that state law affords at least the same level of protection to consumers that federal law provides, the Rule will not be in effect in that state. 16 C.F.R. § 453.9. Thus, not only is the Funeral Rule not a preemptive, pervasive regulation of the funeral industry, it actually encourages concurrent state regulation.

While it is obvious that federal regulation does not preclude West Virginia's regulation, we must address appellant's contention that these two regulatory schemes are in conflict. Clearly they are not. Both strive to protect consumers. To the extent that the Funeral Rule regulates preneed funeral contracts at all, it merely mandates the disclosure of price information and forbids unfair sales practices. West Virginia's statute likewise attempts to curb fraudulent overreaching by curtailing the

solicitation of vulnerable people who are hospitalized or institutionalized or in the sanctuary of their own homes. W.Va. Code § 47-14-10(E) (1983). Likewise, the state's prohibition of unrequested telephone solicitation does not conflict with the Funeral Rule's mandate that price information be given over the phone when requested by consumers. And, we do not even see a connection, let alone a conflict between the Funeral Rule and the West Virginia Act's trusting requirements.⁷ Therefore, we

⁷ To the extent that appellant argues that these requirements prevent it from operating profitably, and thus, lead to an anti-competitive market, it failed to prove its case below. The trial court specifically found that "preneed sales businesses can be operated in compliance with the statute at a profit by the exercise of good business practices." As a finding of fact, we cannot overturn this conclusion unless it is clearly erroneous, however, we are spared this decision because appellant does not challenge the finding on appeal. Consequently, we must assume that this argument is not supported by the evidence.

conclude that W.Va. Code § 47-14-1 et seq. (1983) was not preempted by federal regulation.

III.

Appellant's first amendment challenges focus on the Act's ban on uninvited door-to-door and telephone solicitation:

(a) Any contract seller or agent or employee or person acting in behalf of any such person may not: ...

(5) Solicit by telephone call or by visit to a personal residence, unless such solicitation has been previously requested by the person solicited or by a family member residing at such residence.⁸

⁸ The statute also prescribes solicitation in several other situations. Appellant does not contest these provisions:



Id. § 47-14-10(a)(5). Appellant contends that this provision is an unconstitutionality broad, content based prohibition of its legitimate commercial speech. It maintains that the government interests of preventing overreaching by preneed salesmen and protecting the privacy interests of consumers can be furthered by less onerous restrictions. In particular, appellant points to W.Va. code § 46-A-132 (1974) -- which provides

(a) Any contract seller or agent or employee or person acting in behalf of any such person may not:

(1) Directly or indirectly call upon individuals or persons in hospitals, rest homes, nursing homes or similar institutions for the purpose of soliciting preneed funeral contracts or making funeral or final disposition arrangements without first having been specifically requested by such person to do so; ...



that a consumer may cancel any in-home sale within 72 hours -- to argue that the state's interest in preventing fraud is already adequately protected. As to the government's assertion that these prohibitions protect privacy, appellant maintains that even if privacy were protected by the

(3) Solicit relatives of persons whose death is apparently pending or whose death has recently occurred for the purpose of providing funeral services, final disposition, burial or funeral goods for such person;

(4) Solicit or accept or pay any consideration for recommending or causing a dead human body to be provided funeral services and funeral and burial goods by specific persons, or the services of a specific crematory, mausoleum or cemetery except where such arrangement is the subject of a preneed funeral contract; ...

restrictions, they are too broad to survive first amendment scrutiny. Appellant amplifies its argument in regard to the ban on telemarketing, positing that the perceived risks of overreaching and invasion of privacy inherent in personal solicitation, which could possibly justify the door-to-door ban, are

(d) Anyone making a personal or written solicitation for a preneed funeral contract shall, at the very first instance, divulge the real reason for the contract or solicitation.

(e) The department may adopt rules regulating the solicitation of preneed contracts by certificate holders or registrants to protect the public from solicitation practices which utilize undue influence or which take undue advantage of a person's ignorance or emotional vulnerability. (1983, c. 161).

simply not present when sales are conducted over the telephone. We address this argument point-by-point.⁹

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We reject the dissent's suggestion that because we have upheld the 90% trust requirement, the appellant's first amendment challenges are mooted. This position is premised on the erroneous view that appellant was driven out of business by the trust requirement alone and has made that the centerpiece of its case. Appellant made it perfectly clear at oral argument, however, that its first amendment challenges were fundamental to this dispute:

Judge Butzner: You have to fund 90%?

Appellant: Yes, your Honor.

Judge Butzner: And you want to hold that's unconstitutional.

Appellant: No, your Honor. No, we submitted an argument which in part we felt that the 90% was irrational. We have no problem at all with the concept, with the requirement or need of trusting.

Judge Butzner: Well, I don't understand. You don't agree that 90% trusting is constitutional, do you?

Appellant: Your Honor, we submitted what I believe is a very minor part of our case that we believe that it was an irrational decision on the part of the legislature. There were numerous actuarial studies, some of which in our record which reflect that 50% of the cost is much more than adequate to find these promises. That's the only part there, it's a very minor point.

The trial court rejected appellant's position that these restrictions were content-based and upheld them on the theory that they were permissible time, place, and manner restrictions. The district court reasoned that the prohibitions did not turn on the content of appellant's solicitation, but rather on the places appellant chose to solicit. Although this analysis is facially

Judge Butzner: All right.

Later, the argument turned to the first amendment questions:

Judge Hall: But they (salesmen) go into the home in person or by telephone unsolicited?

Appellant: Yes they do your Honor.

Judge Hall: That's the point of this case, that's what your suit is about.

Appellant: Yes your Honor.

Judge Hall: That is the case.

Appellant: That's the first amendment argument, that's the jewel to this case, that's the central argument.

appealing, I believe that it cannot withstand closer examination.¹⁰

The essence of time, place, and manner restrictions is content neutrality. The disregard of content is why such restrictions are given more deferential review than are

¹⁰ As Judge Kiser notes in his concurrence, although we both reach the same result, that this statute is constitutional; we do so through different reasoning. I cannot concur in Judge Kiser's conclusion that this statute effects time, place, and manner restrictions because it relies too heavily on a false premise, that this statute regulates the funeral profession. A careful reading of the statute shows that it applies to "any person," not just members of the funeral profession. Therefore, even though I believe professional solicitation cases are closely analogous, see n. 11 *infra*, I do not believe that they are so closely analogous that traditional commercial speech analysis should not apply. Thus, the following discussion reflects only my own view of the statute's constitutionality.

other speech restraints. City of Renton v. Playtime Theatres, Inc., 106 S.Ct. 925, 928 (1986). Their intent is not to influence what a speaker has to say, only when, where, or how he says it. Their focus is on the effects of the act of speaking, not on the information conveyed by the speech. Id. at 930.

In one sense, the restrictions in question do not regulate the content of appellant's solicitation--it may make any sales pitch it pleases--they merely dictate where and how appellant may make its pitch. However, in a more fundamental sense, these restrictions are content-based. That is, only solicitors who attempt to speak about preneed funeral contracts are restricted. Thus, even though the statute restricts only the manner and places appellant may solicit business, it turns on the type of business



appellant solicits. Therefore, I cannot adopt the trial court's reasoning and shall carefully scrutinize this statute as a content-based restriction.

IV.

Before beginning this analysis, I pause to note that both parties agree that the speech in issue is purely commercial. As such, although protected by the first amendment, that protection is limited.

Posadas de Puerto Rico Assoc. v. Tourism Co., 478 U.S. 328, 340 (1986); Project 80's Inc. v. City of Pocatello, 857 F.2d 592, 595 (9th Cir. 1988). It is beyond question "that the Constitution accords less protection to commercial speech than to other constitutionality safeguarded forms of expression." Bolger v. Young's Drug Products Corp., 463 U.S. 60, 64-65 (1983). And it is equally well settled that the potential for



deception and invasion of privacy inherent in some forms of commercial speech can, and has, justified content-based restrictions. Curtis v. Thompson, 840 F.2d 1291, 1298 (7th Cir. 1988). Furthermore, these restrictions can certainly be based on the place and manner of the expression, because the protection due commercial speech often turns on the nature of its expression. Central Hudson Gas v. Public Service Comm. of N.Y., 447 U.S. 557, 563 (1980). As the Supreme Court has observed, "when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions." In Re R.M.J., 455 U.S. 191, 203 (1982).

These principles of law make clear that scrutiny of this statute must be guided by



the "common sense" distinction between commercial speech and noncommercial speech. Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 n.24 (1976). First amendment jurisprudence has evolved the disparity of treatment between the two for a reason:

To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate



position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

Ohralik v. Ohio State Bar Assoc., 436 U.S. 447, 456 (1978). It is with this view of commercial speech properly placed in its constitutional context, that I undertake my analysis.

Review of this statute is guided for by the four-part test enunciated in Central Hudson, supra:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether



the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566.

Turning to the facts of this case, the state has not contended that appellant's solicitations were in any way fraudulent or misleading. Therefore, I must conclude that appellant's speech is legitimate commercial speech, which is protected by the first amendment.

Likewise, I have no difficulty in concluding that the government interests furthered by these restrictions are substantial. The most obvious of these interests is the protection of consumers from



overreaching and high pressure sales tactics of this most unique product. W.Va. Code § 47-14-10(e) (1983). Directly speaking, the subject of these contracts is funeral arrangement; indirectly speaking, their subject is death--the death of the buyer, or one close to him. This topic is obviously one charged with emotion and one fraught with the potential for overreaching by solicitors. In promulgating the funeral rule, FTC-noted that the extremely sensitive nature of this subject in part necessitated its regulation:

While the arrangement of a funeral is clearly an important financial transaction for consumers, it is a unique transaction, one whose characteristics reduce the ability of consumers to make careful, informed purchase decisions.



47 Fed. Reg. 42260 (Sept. 24, 1982).

Similarly, the West Virginia legislature has found these contracts so troublesome that by law they are void unless drawn to the legislative specifications. W.Va. Code § 47-14-1 (1983). I concur that in regulating the sales of these contracts the protection of consumers is a substantial state interest.

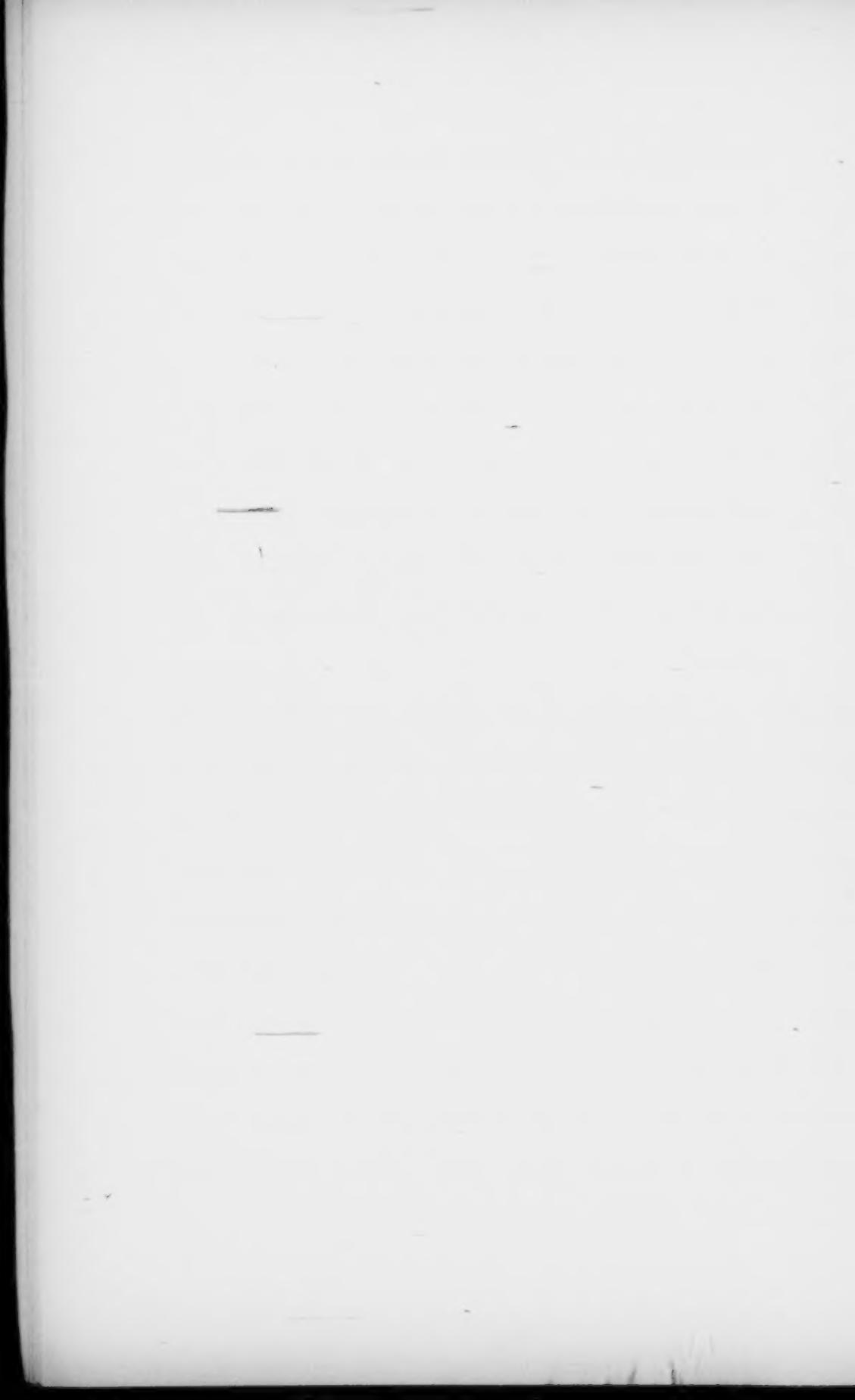
An equally substantial interest underlying this statute is the protection of the privacy of the home. Project 80's, supra, at 596; Curtis, supra, at 1299-1300. The Supreme Court has recently reiterated its willingness to preserve the sanctity of the private home:

"The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized



society." Our prior decisions have often remarked on the unique nature of the home, "the last citadel of the tired, the weary, and the sick," and have recognized that "preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value."

Frisby v. Schultz, 56 U.S.L.W. 4785, 4788 (June 28, 1988) (citations omitted). While I cannot improve on this eloquent defense of the home, I must add that in this context, the solicitation for the funeral arrangements of the individual or a family member, appellant's speech is particularly intrusive. The discussion of the death of a family member can be a disquieting experience when done with a loved one, let alone when done



with a perfect stranger who uninvitedly knocks on your door, or calls on your phone. I believe that West Virginia's ban on solicitation is supported by the substantial interest of protecting privacy.

The next inquiry is whether this ban directly advances these interests. The potential for fraudulent overreaching in the sale of these contracts is at its greatest when the consumer is confronted by a salesman:

Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effort of in-person solicitation may be to



provide a one-sided presentation and to encourage speedy and perhaps uninformed decision making. ...

Ohralik, supra, at 457 (discussing solicitation by attorneys).¹¹ And, as the Supreme Court has recently noted, in-person solicitation is "a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud." Shapero v. Kentucky Bar Assoc., 56 U.S.L.W. 4532, 4534 (June 14, 1988) (attorney solicitation). Thus, I

¹¹ My reliance on Ohralik and other attorney solicitation cases should not be taken as an indication that I do not appreciate the distinction between typical commercial solicitation and attorney solicitation. However, I believe that the unique nature of the produce in this case makes these attorney cases closely analogous. In both, an advocate trained in the art of persuasion is trying to convince an emotionally vulnerable layperson that he needs professional services.



believe the statute clearly advances both of the state's legitimate interests insofar as it bans door-to-door solicitation. See May v. People, 636 P.2d 672 (Colo. 1981) (en banc).¹²

Likewise, I am persuaded that the state's prohibition of telemarketing furthers its interests. This conclusion is reached upon consideration of the three aspects of in-person solicitation that the Supreme court recently found troublesome in Shapero.¹³

12 The fact that W.Va. Code § 46A-2-132 (1983) also provides protection to consumers by allowing unilateral cancellation of in-home sale contracts does not diminish this conclusion. The West Virginia legislature can certainly provide extra protection to its citizenry in the sale of this unique product.

13 As this discussion makes clear, my reasoning concerns telemarketing performed by salespersons. I have not considered the issue of whether telemarketing performed by an automated message player would pose the same risks.



The first of these is that personal solicitation is inherently more difficult to regulate. This is so because the solicitation is "not visible or otherwise open to public scrutiny," Id. at 4534, thus making it nearly impossible for the state to keep tabs on its content. In contrast, written solicitations are much more easily regulated because the sales pitch is preserved in the advertisement itself. Id. Plainly, telemarketing is similar to in-person solicitation in this regard and poses the same threat of undetectable fraudulent and deceptive sales practices.

The second problematic aspect of personal solicitation is that it presents a much greater threat of overreaching or undue influence because of "the coercive force of the personal presence of a trained advocate." Id. Clearly, a salesman's presence over the



telephone is less persuasive than it is in person, but just as clearly, it is more persuasive than a written solicitation. A written solicitation cannot adapt to a consumer's responses, it cannot change its sales pitch to exploit particular vulnerabilities, and it cannot press the reluctant buyer. Thus, although the opportunities for overreaching in telemarketing are not as great as they are in door-to-door solicitation, they are certainly greater than those present in direct mail or other advertising.

Finally, in-person solicitations may be appropriately regulated because of their invasion of a consumer's privacy. While this reason was certainly alluded to by the Shapero court, Id., it was articulated more artfully in the Ohralik opinion:

Unlike the reader of an advertisement, who can "effectively avoid further bombardment of {his} sensibilities simply by averting {his} eyes," the target of the solicitation may have difficulty avoiding being importuned and distressed even if the lawyer seeking employment is entirely well meaning.

Id. at 466, n.25.

Unlike direct mail solicitations that can be readily distinguished and easily discarded, a recipient of telephone solicitation must answer the phone to determine who is calling, and must risk an uncomfortable confrontation to rid himself of the solicitor. Further, it is beyond dispute that this most sensitive product makes an uninvited telephone call even more upsetting,

especially when it invades the privacy of the home. In the words of one commentator, "{t}he telephone is an instrument with a unique capacity to intrude." Note, Give Me A Home Where No Salesmen Phone: Telephone Solicitation and the First Amendment, 7 Hastings Const. L. Q. 129. Thus, like in-person solicitation, telemarketing poses a very real threat to the privacy of a consumer's home. Consequently, because I conclude that telemarketing is in many ways analogous to in-person solicitation, I believe that the state's prohibition of it furthers the state's interests.¹⁴

¹⁴ I reject appellant's contention that because other salesmen are allowed to solicit at private residences, this statute's limited proscriptions cannot possibly further the state's interests in any significant way. Rather, it is obvious that West Virginia's limited prohibitions reflect that its legislature acted in a way respectful of the balancing of interests necessary whenever freedom of expression is limited. It

I turn to the last step of the analysis, the determination of whether the statute sweeps more broadly than necessary to achieve the state's interests. The Central Hudson Court phrased this inquiry as whether the statute is more extensive than necessary to serve the state interests. Id. at 566. Other circuits have interpreted this phrase to mean that before a statute can pass first amendment muster, it must be the least restrictive alternative available to the state. Project 80's, supra at 596-97; Fox v. Board of Trustees, 841 F.2d 1207, 1213-14 (2nd Cir. 1988) cert. granted, 57 U.S.L.W. 3230. I disagree.

Such a rigorous interpretation is not supported by the type of speech in issue. If

attempted to regulate only those solicitations that it has determined to pose the greatest threat to its legitimate interests.



this statute restrained speech concerning "core" first amendment matters, this "least restrictive alternative" standard would be appropriate. This statute, however, regulates purely commercial speech, speech not worth of the first amendment's fullest protection. Ohralik, supra, at 566; Posadas, supra, at 2976 (a "limited form" of protection). In commercial matters, an area traditionally subject to government regulation, Virginia Pharmacy, supra at 771 n.24, more deference is due the legislature than this stringent level of review allows. Posadas, supra at 343-44. This reasoning is especially appropriate in this case, where the commercial speech concerns a matter that the state legislature has comprehensively regulated as a threat to the consuming public. Therefore, in review of this statute, I do not believe that courts should

engage in a speculative search for the least restrictive alternative. Rather, a provision should be upheld as long as the state has chosen a reasonable means of regulation that is not excessive in view of its legitimate interests. See American Future Systems v. Pa. State Univ., 752 F.2d 854, 865-66 (3rd Cir. 1984), cert. denied, 473 U.S. 911.

In making this determination, a court should view the anti-solicitation statute as a whole. West Virginia has demonstrated that two substantial interests underlie this statute, the protection of its people from fraud and the protection of its people's privacy. To further these interests, the legislature has restricted appellant's speech in a few specific situations that it identified as particularly prone to these problems--when the consumer is in a hospital, in a nursing home, confronted by the death of



a loved one, or in the privacy of his own home. W.Va. Code § 47-14-10 (1983). Similarly, the legislature has prohibited only two limited forms of speech that it felt posed special threats to the state's interests--uninvited in-person solicitation and telemarketing. Out of this scheme, appellant challenges only the state's restraint on in-home solicitation. I find it to be constitutional.

In making this finding, I place great weight on the alternatives left open by the statute:

(b) Notwithstanding any other provision of law to the contrary, nothing in this article shall be construed to restrict the right of a person to lawfully advertise, to use direct mail or otherwise communicate in a manner not within

the above prohibition of solicitation or to solicit the business of anyone responding to such communication or otherwise initiating discussion of the goods or services being offered.

(c) Nothing herein shall be construed to prohibit general advertising.

W.Va. Code § 47-14-10 (1983).

Thus, the statute does not totally insulate the private residence from appellant's speech. With all of these avenues of communication left open, it would be difficult to conclude that the statute's measures are excessive.¹⁵ Furthermore, the avenues left open confirm that the statute is

¹⁵ Appellant again argues that these alternatives are not viable because they cannot be exploited profitably. This argument must be dismissed because it is not supported by the evidence. See n.7, supra.



narrowly drawn, to eliminate no more than the evils it seeks to remedy--fraud and invasion of privacy. Frisby, supra, at 4788. And, while I agree with appellant that West Virginia's statute implicates appellant's first amendment rights, this implication is even more minimal than would be other restraints on its speech because personal solicitation "is a business transaction in which speech is an essential but subordinate component." Ohralik, supra, at 457 (emphasis added). Therefore, I conclude that this statute's proscriptions are not excessive. See May, supra, (ban on all commercial door-to-door solicitation found not excessive).

This conclusion is easily reached in view of the important state interests present in this case. The West Virginia legislature has determined that the speech in question

poses a serious threat of fraud and overreaching to its citizenry. W.Va. Code § 47-14-10(e) (1983). The Supreme Court has made it clear on several occasions that when a form of commercial speech is subject to abuse, a state may act to regulate. Posadas, supra; In Re R.M.J., supra; Ohralik, supra; Friedman v. Rodgers, 440 U.S. 1 (1979).¹⁶

16 Thus, my reasoning in this case is distinguished from the line of authority, exemplified by Project 80's, supra, which has invalidated blanket prohibitions of all door-to-door commercial solicitation. These cases have properly focused on the informational aspect of solicitation, i.e. that the disbursement of legitimate commercial information is essential in a free enterprise economy. The conclusions I have reached do not undercut this principle. I propose doing nothing more than upholding the restriction of a particular form of advertising that has been found to be potentially misleading.



Likewise, it is axiomatic that it is well within a state's police powers to act in protection of the privacy of the home. As another court has remarked: "when the fundamental right to privacy clashes with the right of free expression, the interest in privacy does not play second fiddle when the speech is merely intended to propose a commercial transaction." *Curtis, supra*, at 1300. Likewise, I refuse to consign the privacy of the home to the second chair.¹⁷

17 My reasoning is not in conflict with Optimist Club of North Raleigh, N.C. v. Riley, 563 F.Supp. 847 (1982), or Planned Parenthood League v. Attorney General, 391 Mass. 709, 464 N.E.2d 55 (Mass. 1984). In both cases, the court struck down blanket prohibitions on all charitable solicitation made by paid telephone operators. Here, the issue is commercial not charitable speech, thus, less protection is due. Further, this is not a blanket prohibition of all commercial telemarketing, rather it is the prohibition of one type of solicitation particularly amenable to abuse.



I conclude my discussion by observing that this presents a textbook case of the appropriate restraint of commercial speech. The state legislature has determined a mode of commercial speech to be inherently troublesome and has acted in a reasonable way to remedy these troubles. It imposed limited restraints on speech while preserving appellant's ability to advertise its product. Finally, the statute is necessitated by legitimate, important state interests. Thus, I cannot conclude that it offends the first amendment.

V.

In sum, we unanimously hold that West Virginia's statute is not preempted by the FTC's Funeral Rule. A majority of the panel also concludes that its provisions do not violate the first amendment. Therefore, the district court is affirmed.

AFFIRMED

KISER, DISTRICT JUDGE, CONCURRING:

I concur with the results reached by Judge Hall and in his opinion except as to his analysis of the First Amendment issue.

I write separately to point out that determining whether a regulation is aimed at the content of speech or the time, place or manner in which speech is delivered is no easy task. In this case, unlike Judges Hall and Butzner (in his dissenting opinion in Guardian Plans), I think the regulations come down on the side of time, place, and manner. As Justice Stevens observed, "Any student of history who has been reprimanded for talking about the World Series during a class discussion of the First Amendment knows that it is incorrect to state that a 'time, place, or manner restriction may not be based upon either the content or subject matter of



speech.'" Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York, 447 U.S. 530, 544-45 (1980) (Stevens J. concurring). Sometimes it is the very content of the speech that makes it inappropriate in a particular time or place. A student can talk about the World Series after history class.

Both state and federal governments have determined that the funeral industry needs regulating to prevent deceptive practices. In an industry where regulation is both appropriate and necessary, the government may have a strong interest in regulating speech. For example, speech is necessarily a part of many sales transactions. Regulation of speech may be an essential part of a government regulation scheme for an entire industry.

Commercial speech, like other speech, is subject to reasonable time, place, and manner restrictions that serve a significant government interest and leave open ample alternative channels of communication.

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976). Some time, place, and manner restrictions may be directed at speech on a particular topic, and yet such regulations are not necessarily "content-based." for example, the Supreme Court found that a restriction on the location of adult theaters was not content-based, because the regulation was aimed at the secondary effects of the theaters on the surrounding community. See City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986).

The regulation of lawyers' solicitation provides a natural analogy to the regulation

of funeral directors' sales pitches. Both situations offer the potential for trained professionals to overwhelm the unwary consumer. The Supreme Court has permitted the states to ban in-person soliciting by lawyers because of the special dangers presented by such speech. Ohralik v. Ohio State Bar Association, 436 U.S. 447, 457 (1978). Even though the ban on soliciting was aimed solely at lawyers, the Court did not subject the regulation to the rigorous scrutiny required for content-based regulation. In fact, the Court held that such regulations required less scrutiny:

In-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component. While this does not remove the speech from the



protection of the First Amendment, as was held in Bates and Virginia Pharmacy, it lowers the level of appropriate judicial scrutiny.

Id. at 457, 459. That the regulation of speech in Ohralik was permissible under a time, place, and manner analysis becomes even more apparent when it is compared with Bates v. State Bar of Arizona, 433 U.S. 350 (1977). In Bates, Arizona sought to ban lawyer solicitation through advertising media. The Court struck down Arizona's regulation as being too broad but left open the question of whether a state could ban in-person solicitation. Then, in Ohralik, the Court addressed the question of in-person solicitation and found that a state's ban on this method of advertising was permissible. In both cases, the state regulations were aimed at lawyer solicitation of prospective clients, but the deciding difference was the



manner of solicitation which was forbidden. From a comparison of these two cases, it seems to me that reasonable regulations governing the time, place, and manner of advertising by members of a regulated profession will not be subject to the heightened scrutiny applied to content-based regulations.

In my view, the West Virginia regulations are a permissible time, place, and manner restriction on the speech of funeral directors, a necessary part of a general scheme for regulating the funeral industry. As Judge Hall notes, the regulations leave open ample alternative channels of communication. If the regulations had banned all in-person soliciting in order to end abuses in the funeral industry, the regulations undoubtedly would be struck down as being too broad. Cf.



United States v. Kokinda, No. 87-5107, slip op. at 11 (4th Cir. January 31, 1989). On the other hand, a more narrow regulation simply could not be an effective means of combating the potential abuses of in-person solicitation. See Ohralik, 436 U.S. at 466. Thus, the West Virginia regulations are narrowly tailored to serve the significant state interests of preventing abuses in the funeral industry. I believe the regulations should be upheld as a valid time, place, and manner restriction.

BUTZNER, Senior Circuit Judge, concurring in part:

I concur in Part II of the court's opinion which holds that the Federal Trade Commission's Funeral Rule does not preempt W.Va. Code § 47-14-1, et seq. (1983). I also concur in Part II n.6 which holds that the district court properly rejected the claim

that the statute violates the due process and equal protection clauses of the fourteenth amendment because it requires that 90% of the payments made for preneed contracts be placed in trust. In view of these rulings, it is unnecessary to decide whether the statute also infringes rights secured by the first and fourteenth amendments with respect to solicitation and telemarketing. Consequently I do not concur in parts III, IV and V.

National Funeral Service principally complains about the requirement for placing 90% of preneed contract payments in trust. The company's president testified that with overhead expenses of 35%, the 90% trust requirement made it impossible for the company to operate. He explained that even if there were no prohibition against solicitation, the company would be unable to conduct its business. The president's testimony is the basis of the litigation



position that is stated in the company's brief:

West Virginia Code § 47-14-5 further requires the trusting of ninety percent (90%) of all funds collected under the contract at the time when the funds are collected. This provision effectively allows only ten percent (10%) of the gross contract price for overhead, sales, and other current expenses including commissions to salespeople. Such a high trusting percentage effectively (and the Appellant submits intentionally) ceased the sale of preneed funeral contracts in the State of West Virginia. The minimal percentage permitted to be retained for the purposes of meeting sales,



overhead, and other expenses totally precludes the operation of any large scale preneed sales organization and effectively stopped price and product competition and the dissemination of price and product information by preneed funeral sellers.

The Appellant has been forced to cease all business operations and has in fact not sold any further preneed funeral goods or services under preneed contracts in the State of West Virginia since the implementation of West Virginia Code § 47-14-1.

Appellant's Brief pp. 6 and 7. At oral argument National Funeral Service insisted that it wanted a decision on its claim that the statute violated the first amendment.



But it never retracted its position, unequivocally expressed by testimony and brief, that the trust requirement, without regard to the ban on solicitation, precluded it from doing business in the state.

Inasmuch as the company finds itself unable to conduct its business because of the trust requirement, the controversy over other provisions of the statute is mooted. This is so even though the district court found that the statute did not preclude companies from engaging in preneed business. Even if we were to decide the other issues in favor of National Funeral Service, our decision would be of no practical consequence to it, for in testimony and brief it has asserted in unmistakable terms its litigating position. In the context of this case, our views about telemarketing and other means of solicitation have only the academic significance of an advisory opinion.

89-639 (4)

No. 89-____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL FUNERAL SERVICES, INC.,
a West Virginia corporation,

Petitioner,

v.

JOHN D. ROCKEFELLER, IV, Governor
of the State of West Virginia, *et al.*,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the Fourth Circuit's decision that West Virginia may prevent unlimited telemarketing and door-to-door solicitation of funeral goods and services, when numerous other methods of solicitation are allowed, is worthy of review?

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STATEMENT OF THE CASE

The State of West Virginia regulates the sale of preneed burial contracts under a statutory scheme established by W. Va. Code §§ 47-14-1 et seq. (hereinafter "the Act"). These contracts cover the sale of certain funeral goods and services as defined by the Act. In 1983

the Act was amended, and certain restrictions were placed on door-to-door solicitation and telemarketing. Specifically, such forms of solicitation were barred absent a prior request from a consumer for such contact. W. Va. Code § 47-14-10. Marketers remain free to solicit door-to-door or by telephone if the consumer makes a prior request for such communication.

Contrary to petitioner's assertions, the Act applies to any person who sells preneed funeral goods or services whether they be funeral directors, cemeterians, or anyone else. The Act's scope distinguishes between the type of item or service sold, not the type of seller. A cemeterian selling caskets or other non-excluded items is fully covered by the Act.

Petitioner marketed preneed funeral goods and services in West Virginia through a variety of means including newspaper advertisement, mass mailings, door-to-door solicitation and telemarketing. The Act does not impose a total

ban on any of these sales methods. It only restricts use of the latter two to instances where a consumer has initiated a request for such contact. The solicitation restrictions at W. Va. Code § 47-14-10 reflect the intent of the Legislature in protecting the privacy and vulnerability of consumers to overreaching. That intent is reflected in W. Va. Code § 47-14-10(e) which provides that:

"The department may adopt rules regulating the solicitation of preneed contracts by certificate holders or registrants to protect the public from solicitation practices which utilize undue influence or which take undue advantage of a person's ignorance or emotional vulnerability."

After the amendments to the Act were passed in 1983, petitioner filed the case at bar in the United States District Court for the Southern District of West Virginia. Petitioner challenged the solicitation restrictions on telemarketing and door-to-door sales on constitutional grounds. Contrary to petitioner's implication that it was forced to cease

operating in West Virginia, the trial court held that petitioner "made the voluntary business decision to leave the market place * * *. Any possible harm to plaintiff's constitutional rights is totally conjectural, hypothetical, speculative, unsupported and unproved." (Appendix to Petition at B6.) The trial court also found that:

"8. Even though door-to-door sales and telephone solicitations are prohibited by the statute, except upon request of an interested purchaser, preneed sales businesses have been shown to be profitable even with the 100% trusting requirement. The preneed sales businesses can be operated in compliance with the statute at a profit by the exercise of good business practices." (Appendix to Petition at B4.)

After the trial court denied petitioner's request for relief, an appeal to the Fourth Circuit resulted in an opinion upholding the Act. A petition for rehearing en banc was rejected without one vote of support for petitioner.

The issue raised by this petition is whether this Court should review the Fourth Circuit's decision which held that the West Virginia ban on telemarketing and door-to-door solicitation absent a prior request from a consumer for such contacts did not violate petitioner's First Amendment rights.

SUMMARY OF ARGUMENT

Petitioner does not raise any significant issue which has not been previously settled by this Court. Both the trial court and the Fourth Circuit decided the First Amendment issues correctly under the test applicable to commercial speech as stated in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 65 L. Ed. 2d 341, 100 S. Ct. 2343 (1980), and recently clarified in Board of Trustees of the State University of New York v. Fox, 492 U.S. ___, 106 L. Ed. 2d 388, 109 S. Ct. 3028 (1989).

Petitioner's assertion that the distinctions created by the regulatory

provisions of the Act are invidious violations of the First Amendment rights should only be scrutinized in light of whether there was a rational basis for such distinctions. The record supports such rational policy decisions by the Legislature.

Petitioner's claim that the Act violates the Supremacy Clause is without merit because the Federal policy enunciated in the Funeral Rules does not preempt state regulation in the area and because the Act does not thwart the implementation of the Federal policy behind the Funeral Rule.

ARGUMENT: REASONS FOR DENYING THE WRIT

1. Petitioner Fails to Raise Any Significant Issue Which Has Not Been Settled by This Court.

This petition should be denied because it raises no significant constitutional issue that has not been settled by this Court. The recent case of Board of Trustees of the State

University of New York v. Fox, 492 U.S. ___, 106 L. Ed. 2d 388, 109 S. Ct. 3028 (1989), clarified and reaffirmed Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 65 L. Ed. 2d 341, 100 S. Ct. 2343 (1980). Fox held that governmental regulation of commercial speech need not be the absolute least restrictive means to achieve the state's interest. The Court stated that:

"What our decisions require is a 'fit' between the legislature's ends and the means chosen to accomplish those ends, * * * --a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' * * *. Fox, supra, 109 S. Ct. 3028 at 3035.

Petitioner's attempt to distinguish Fox from its case is without merit. The state's interest in protecting the privacy of the home has long been recognized by this Court. Frisby v. Schultz, 487 U.S. ___, 101 L. Ed. 2d 420, 108 S. Ct. ___, (1988); Carey v. Brown, 447 U.S.

455, 65 L. Ed. 2d 263, 100 S. Ct. 2286 (1980). This interest is even more substantial when it involves the sensitive context of discussing one's death or the death of a loved one with an uninvited stranger. Judge Hall's opinion recognized that such a commercial context was "particularly intrusive" and a "disquieting experience" with potential for "fraudulent overreaching." (Appendix to Petition at B48 and B49.)

The State's regulation of such contact is an obvious reasonable fit. W. Va. Code § 47-14-10(b) and (c) provides that:

"(b) Notwithstanding any other provision of law to the contrary, nothing in this article shall be construed to restrict the right of a person to lawfully advertise, to use direct mail or otherwise communicate in a manner not within the above prohibition of solicitation or to solicit the business of anyone responding to such communication or otherwise initiating discussion of the goods or services being offered.

"(c) Nothing herein shall be construed to prohibit general advertising."

Thus, a wide variety of solicitation mechanisms remain available to petitioner. Even telemarketing and door-to-door solicitation are allowed if the consumer initiates the contact. Petitioner's assertions that the State imposes a "total" or "absolute" law on door-to-door solicitations and telemarketing (See Petition at i and ii) are simply inaccurate. The restrictive nature of the State's regulations on soliciting are narrowly drawn and, since the interest of the State is substantial, the "fit" is reasonable.

2. The Record Provides Sufficient Factual Justification for the State's Limited Regulation of Telemarketing and Door-to-Door Solicitation.

Petitioner asserts that the State had no factual basis establishing sufficient governmental interests to single out the preneed funeral industry or uninvited telemarketing and door-to-door

solicitation for regulation. This ignores the fact that in Ohralik v. Ohio State Bar Association, 436 U.S. 447, 56 L. Ed. 2d 444, 98 S. Ct. 1912 (1978), this Court rejected an argument that only proof of actual harm to a consumer by petitioner's conduct justifies a regulation. Rather Ohralik recognized the need for "prophylactic measures whose objective is the prevention of harm before it occurs." Ohralik, at 464. Ohralik noted that the Federal Trade Commission had long before identified abuses in the direct-selling industry. Id., and n.23 therein.

Similarly, in the case at bar both the trial court and the Fourth Circuit were alerted to the documented potential for abuse in the funeral service industry and the need for regulation. (Joint-Appendix Vol. I filed with the Appellate Court at 176-77 and 207-82.)

The appellate court's reliance on Ohralik, is well placed. In this case, as in Ohralik, there is an inherently greater risk of overreaching or coercion.

Both cases involve promotion, through personal contact of vulnerable consumers, by one trained to persuade. The "disquieting" and "intrusive" nature of planning one's funeral or the funeral of a loved one is fundamentally different from the door-to-door sales or telemarketing of furniture or appliances which the State has chosen to leave unregulated.

3. The State Can Establish Distinctions in Regulating an Industry on a Rational Basis.

Petitioner claims that the Act's distinctions in exempting certain types of sales should be examined by a more stringent test than mere, "rational basis." This is a meritless attempt to make a First Amendment claim out of what is really only an equal protection argument.

It is well settled that a statute is not invalid simply because it could have gone farther or because it did not eliminate all potential evils. Katzenbach v. Morgan, 384 U.S. 641, 16 L. Ed.

2d 828, 86 S. Ct. 1717 (1966); Roschen v. Ward, 279 U.S. 337, 73 L. Ed. 722, 49 S. Ct. 336 (1929); Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 79 L. Ed. 1086, 55 S. Ct. 570 (1935); and Williamson v. Lee Optical Co. of Oklahoma, Inc., 348 U.S. 483, 99 L. Ed. 563, 75 S. Ct. 461 (1955). Even New Orleans v. Dukes, 472 U.S. 297, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976), invoked by petitioner, cites this line of cases with approval.

Petitioner argues that commercial speech is a "fundamental right" justifying more stringent scrutiny of regulation. Significantly, petitioner cites no case, from this Court or any other, holding that commercial speech is a fundamental right analogous to, racial, or religious classifications which are subject to more rigorous scrutiny.

The correct standard for scrutinizing the State's decision to regulate only a portion of solicitation methods and only certain industry practices is merely whether a rational basis existed

for such policy choices. Since this Court has recognized the significant State interests in Ohralik, Frisby, and Carey, supra, and since only commercial speech is involved and it is regulated in a narrowly drawn fashion, the correct standard was applied with a proper result.

4. The Fourth Circuit Correctly Rejected Petitioner's Preemption Challenge to the State's Regulation.

The appellate court's discussion of the preemption issue raised by petitioner and the standards set forth in Pennsylvania v. Nelson, 350 U.S. 497, 502-505, 100 L. Ed. 640, 76 S. Ct. 477 (1956), was an accurate interpretation of the law and a correct application of that law to the facts of this case. The Federal Trade Commission's Funeral Rule, 16 C.F.R. §§ 453.1 et seq. neither explicitly nor implicitly precludes state regulation in the area. In fact, the Funeral Rule allows a state to meet or exceed its standards and take over primary enforcement authority. 16 C.F.R. § 453.9(b).

The primary purpose of the Funeral Rule is to promote price disclosures and control certain sales practices. The Act does not thwart these purposes. Compliance with the Act still provides for disclosure of price information by a variety of methods including direct mail, advertising in various media and even over the telephone or by home visits when such contacts are requests by a consumer.

The Act's limits on the disclosure of information in certain narrow contexts, i.e., uninvited home and telephone solicitation, is rationally related to a substantial and legitimate State interest. The limits are narrowly drawn and provide considerable alternative methods of price disclosure. There is no pre-emption claim because Federal policy is not frustrated. Although petitioner tries to imply that the Funeral Rule compels telephone communication of information, a closer reading reveals that such telephone disclosure is required when the consumer initiates the call. 16 C.F.R. § 453.2(b)(1).

CONCLUSION

This petition raises no novel issue of constitutional import. A recent decision of this Court clarified the permissible scope of state regulation of commercial speech. The lower courts correctly applied the appropriate legal standards to the facts of this case.

The State of West Virginia has a substantial interest in preventing the potential abuse associated with uninvited telemarketing or home solicitation of funeral goods and services. The State's regulatory scheme is a reasonable response. It leaves petitioner with a wide variety of other means to promote its services; limited only by the imagination of modern marketing techniques. Because the Act is narrowly drafted and leaves petitioner ample alternative means to exercise its right to commercial speech, it does not violate the First Amendment. For the foregoing reasons, respondents request that his petition be denied.

Respectfully submitted,

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¹ On January 16, 1989, Gaston Caperton became Governor of the State of West Virginia.

² In 1987 the Act was amended and the Office of the Attorney General replaced the State Department of Labor as the agency responsible for administering the Act.